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ABSTRACT

Legislation pertaining to American Indian affairs is highly dependent upon the events and movements of history. No purified legal theory such as contract law or the law of damages emerges from the field of Indian law. While some of the legal theory must come from the ratified treaties, statutes, and case law defining the relationship of the United States and the Indian tribes, a great deal of the legal theory must come in tracing developments of a continuing nature in the actions of the U.S in fulfilling its legal obligations about which no doubt whatsoever exists. This paper presents: (1) a chronology of the Federal-Indian relationship; (2) an analysis of treaty responsibility for education of Indians; (3) a chronology of delegation of legal responsibility of the U.S. to government departments and agencies; and (4) interpretation of the legal responsibility of the Federal government in the field of Indian education. Some historical developments which were relevant in determining the Federal government's legal obligations in Indian education are traced. Discussion of the development of Federal policy in the field of Indian affairs deals specifically with the gradual merger of 2 different forms of obligations--treaty rights and the general concern for Indian welfare as seen in statutory law. (Author/NQ)

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DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
OFFICE OF EDUCATION
WASHINGTON, D.C. 20202

August 20, 1975

Dear Colleague:

The following is a brief overview of a policy paper prepared for the Office of Indian Education entitled "A Legislative Analysis of the Federal Role in Indian Education." This paper was prepared in response to requests from both the Office of the Secretary, Department of Health, Education, and Welfare and the Office of Education that a paper be prepared that delineated and substantiated the basis for the present role of the Office of Education in Indian Education.

In laying out the basis for the Federal role in Indian education, this paper covers the following areas:

- a chronology of the Federal-Indian relationship
- an analysis of treaty responsibilities for education of Indians
- a chronology of delegation of legal responsibility of the United States to government departments and agencies
- interpretation of the legal responsibility of the Federal government in the field of Indian education.

We hope that you will find this paper to be a useful reference tool for the legal perspective it provides. We look forward to your continued interest in and support of Indian Education.

Sincerely,

William Demmert Jr.

William G. Demmert, Jr.
Deputy Commissioner
Office of Indian Education

Legislative Analysis of the Federal Role in Indian Education

by

Vine Deloria, Jr.

The work presented or reported herein was performed pursuant to a Contract from the U.S. Office of Education, Department of Health, Education and Welfare. However, the opinions expressed herein do not necessarily reflect the position or policy of the U.S. Office of Education and no official endorsement by the U.S. Office of Education should be inferred.

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Foreword

The subject of this paper is the "Legislative Analysis of the Federal Role in Indian Education." Indian Affairs, unlike some other areas of law, is highly dependent upon the events and movements of history. No purified legal theory such as contract law or the law of damages emerges from the field of Indian law. Rather we are faced at every turn with discovering "what happened" and from our knowledge of the events of the past we are able to project with a reasonable basis in fact what legal theories were accepted and used as the basis for judgements in the field of Indian Affairs.

When confronted with the task of determining the federal role in Indian education we must understand education as merely a part of a larger relationship which is partially political, partially moral, and partially pragmatic existing between communities of Indians and the United States. While some of the legal theory must come from the ratified treaties, statutes and case law defining the relationship of the United states and the Indian tribes, a great deal of the legal theory must come in tracing developments of a continuing nature in the actions of the United States in fulfilling its legal obligations about which no doubt whatsoever exists.

This paper attempts to trace a number of historical developments which have a relevance in determining the legal obligations of the federal government in the field of Indian education. The first section deals with the development of federal policy in the field of Indian Affairs, dealing specificially with the gradual merger of two different forms of obligations - treaty rights and the general concern for Indian welfare as seen in statutory law.

The second section traces out some typical treaty articles and gives the historical background of the treaty council, letters of instructions to treaty commissioners, and reports by treaty commissioners. Too often treaty obligations are understood as a vaguely defined promise unrelated to legal rights and having mainly a historical curiosity for policies today. Yet the trend of case law today indicates that more and more the courts will look to the treaty articles, records of proceedings, and other data to determine the nature and extent of the federal government's obligations to Indians.

The third section reviews the instances in which federal legal obligations have been assigned to various departments other than the Interior Department. Part of the mythology of Indians Affairs in recent years had been that the Indian programs are located solely in the Interior Department. Such is not the case and a review of the many instances, in early American history and in modern times, when specific programs of government departments have been opened to Indians dispels such a belief.

The last section reviews the attitudes of the three branches of the federal government to indicate that while at times each of the branches of the government has advocated the termination of special services to Indians, the general trend is just as strong for the three branches of the federal government to advocate an expanded role for the federal government in fulfilling its legal obligations. Finally the many questions such as eligibility for programs, determination of the meaning of specific Indian programs, and recognition of Indian tribal governments as sponsoring agencies with a "federal instrumentality" aspect of political status are discussed in order to show that there is a consistent pattern of action and understanding in the federal government of its legal obligations to Indians.

By concentrating on the historical background of legislation, treaty negotiations, and departmental services to Indians, we have the context within which any specific determination of present legal responsibilities to Indians can be understood. Without this historical background it could be arguable, on the basis of court dicta or administrative rulings, that Indians may or may not be eligible for certain services from the different government departments. But such arguments would be taken outside of the historical context of what had actually happened and placed in isolation as abstract propositions of law. Legal theories, absent the historical context out of which they came and the present social context in which they are to be enforced, are misleading at best.

It is hoped, therefore, that the following paper will serve to provide an understanding of the present stance of the federal government in providing services to Indians and to Indian tribal organizations. Orientation of the present programs within this historical analysis will enable Indians and administrators to understand the era in which we live and the antecedents which have created this era. With this understanding we can move forward to fulfill our various responsibilities within the continuing federal relationship of Indians and the United States government.

I. A CHRONOLOGY OF THE FEDERAL RELATIONSHIP

A. Introduction

The relationship between the United States government and the American Indian tribes is like no other relationship between a modern nation and the aboriginal inhabitants of the lands which it now occupies. A definite political structure exists with well-defined doctrines and responsibilities in the American situation that does not exist with respect to any other nation. This structure is a result of the unique history of the United States and the pattern of settlement of that portion of the North American continent which now forms the United States.

B. The Colonial Period

The pre-history of the United States is one in which the great colonial powers of Europe each formed areas of settlement in North America and claimed, on the basis of the Doctrine of Discovery, to exert certain powers of government over the lands which they had "discovered." Discovery brought with it, under the then popular international legal doctrines, the exclusive right to purchase the lands of the aboriginal inhabitants, as against any claims which might be exerted with respect to the lands by other European nations.

As the colonial wars eliminated The Netherlands, Sweden France and finally Spain from consideration as dominant political powers in North America, England and its colonies assumed the claims of the European community of the right to purchase the lands of the aboriginal inhabitants who were now popularly called Indians. With the revolt of the American colonies against Great Britain an interim period of quasi-independence of Indian tribes resulted that did not come to an end until the Treaty of Ghent when England finally withdrew its claims and political interests to the lands of the Ohio and Mississippi valleys.

C. Post Revolutionary War Period

The negotiations at Paris ending the Revolutionary War saw Great Britain demand that a vaguely defined territory controlled by Indians be recognized west of the line of demarcation which had been created by the Proclamation of 1763 issued by the King of England. Americans argued that the United States had received a recognition of its sovereignty over the old Northwest Territory in the Paris Peace conference. The facts indicate that while the United States attempted to exert total political control over the area and did indeed receive several massive land cessions in the area, that the War of 1812, in which the majority of Indian tribes of the area were allies with Great Britain, demonstrated that the Indian tribes did not in fact regard themselves as wards of the United States during the period 1783-1815.

The first Indian treaties signed following the Revolution and statutes passed by the United States Congress seem to indicate that the United States did not regard its claim to political control over the tribes as absolute in any sense. Provisions were made in the treaties with the Delaware[1] and the Cherokees[2] to allow them to send delegates to the United States Congress when they felt inclined to do so. Initial statutes dealing with the Indian tribes were exclusively trading statutes and a system of factories was initiated to regulate trade with the Indians and to allow the Indians to produce products for sale to the United States.[3]

Civil and criminal jurisdiction and the right to self-government were preserved to the tribes in these early treaties[4] and in some cases the tribes were allowed to punish white intruders on their lands according to their own laws. Passports were regularly issued by the Governors of the organized territories or by military commanders of frontier posts for travel into the lands of the respective Indian tribes.[6] The obligations undertaken by treaty by the United States in the period from 1783-1815 were those of a protectorate nature in which, in return for land cessions and trading concessions, the United States guaranteed certain rights to the Indian tribes.

The United States reorganized its administrative structure under the Constitution following seven years of government under the Articles of Confederation and Indian Affairs were placed under the Department of War in 1789.[7] Two days after the creation of the War Department the Northwest Ordinance was passed (August 7, 1789) and the policy for dealing with the Indian tribes was established in Article Three of this Ordinance:

> The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.[8]

A year later Congress passed a statute defining the pattern of settlement for the lands south of the Ohio River,[9] and the Ordinance for the government of the old Northwest was made applicable to the territory.

The lands west of the Royal Proclamation line, while in some cases claimed by the individual colonies,[10] were, from an international point of view, still the lands of the Indians and subject to negotiated sale by the Indians. The Act of August 20th, 1789, "An Act providing for the Expenses which may attend Negotiations or Treaties with the Indian Tribes, and the appointment of Commissioners for managing the same," established a fund of $20,000 which was derived from the "duties on imports and tonnage."[11] The precedent was thus established during this interim period that Indian Affairs were directed to the military department but the funds used to support Indian activities came out of trade revenue and thus preserved the "international aspect" of Indian Affairs.

The Trade and Intercourse Act of July 22, 1790[12] outlined the regulations under which private citizens could trade with the Indians. Individuals found trading without a government license had their goods confiscated and individuals were barred from purchasing lands from the tribes except in a public treaty held under the authority of the United States. Criminal offenses committed by American citizens in the territories of the respective tribes were considered crimes and were defined according to the laws of adjoining states. Persons committing such crimes were liable to punishment when apprehended in that state.

The Act of February 23, 1795[13] established in the Department of the Treasury an officer "to be denominated, 'Purveyor of Public Supplies,'" who had the duty of procuring and providing all Indian goods. With this act the administrative responsibility for Indian Affairs was distributed among five different government departments. The War Department had responsibility for Indian Affairs generally. The Treaty Commissioners operated under the President and were authorized by him to negotiate whatever treaties he felt necessary to preserve the peace. The Governors and military commanders of frontier posts were responsible for passports and licenses for trade; and the Purveyor of Public Supplies, an officer of the Treasury Department, purchased goods for Indian trade. The State Department, as a matter of practice more than law, became responsible for maintaining the records of the treaties and handled territorial correspondence involving Indian affairs.

The Act of March 3, 1799[14] elaborated on the initial rules and regulations of the Trade and Intercourse Act of 1790 and strengthened provisions of punishment and jurisdiction of the former act. The following year an "Act for the preservation of peace with the Indian tribes,"[15] provided for the punishment of any individual who sought to incite the Indians to violate a treaty or "disturb the peace and tranquillity" of the United States. To ensure that tranquillity Congress later in the year passed an act authorizing army post commanders to feed visiting Indians and allowing the President to pay the expenses of visiting Indian delegations to the capitol.

All of these acts indicated an awareness on the part of the United States of its expanding responsibility to provide a number of services not anticipated by the treaties but necessary to ensure that the relationship between the United States and the Indian tribes functioned smoothly. In the broad context of legal responsibility of the United States in the field of education we can understand that these early laws were required by a spirit of understanding derived from the treaty negotiations and therefore a responsibility of the United States, in an internal domestic sense, to ensure its fulfillment of the treaties.

The Act of March 30, 1802[17] again expanded the basic trading regulations for Indian Affairs. The provisions of the former Trade and Intercourse Acts were reaffirmed and the provision of the Act of 1799 which allowed the President to furnish the Indians with "useful domestic animals, and implements of husbandry, and with goods or money, as he shall judge proper," was expanded from a mere phrase to a whole section of the act:

> Sec. 13. And be it further enacted, That in order to promote civilization among the friendly Indian tribes, and to secure the continuance of their friendship, it shall be lawful for the President of the United States, to cause them to be furnished with useful domestic animals, and implements of husbandry, and with goods or money, as he shall judge proper, and to appoint such persons, from time to time, as temporary agents, to reside among the Indians, as he shall think fit: Provided, that the whole amount of such presents, and allowance to such agents, shall not exceed fifteen thousand dollars per annum.

This section has historically been viewed as the first effort to "civilize" the Indians and many historians of Indian Affairs date the assumption of social and educational services provided by the United States to Indian tribes from this section of the Intercourse Act of 1802.

In general such interpretations are correct but the usual implication given to Section 13 is that the United States was not legally required to provide this "civilization" fund to the tribes. Therefore, traditional reasoning has gone, the United States has discretionary powers to provide services which are oriented toward the civilization of the Indians. This interpretation is not strictly correct.

Section 13 states that "in order to promote the civilization among the friendly Indian tribes, and to secure the continuance of their friendship," the President can provide the Indians with the goods and materials indicated. We see in this section the United States acknowledging that continued friendship with Indians must be accomplished in terms which the Indians would understand. Thus the Congress gives the President this particular authority to enable him to fulfill the "peace and friendship" provisions of the treaties, and if the President is not obligated by domestic statutory law to provide these services and moneys, he is obligated under treaty law to do so since it is his responsibility to maintain peace with the tribes.

While the specific expenditures of this fund may be discretionary with regard to items purchased and presented to the Indians, it is not a discretionary fund with respect to the fulfillment of the treaty obligations by the United States to protect the Indians and to preserve peace. Section 13 must be read in the background of Section 1 of the act which carefully delineates the Indian Territory from the lands of the United States. And it must be read in the historical context of the United States wishing to preserve a friendship with the Indian tribes in order to prevent Great Britain from extending its friendship with them to the detriment of the United States.

The interpretation of the Act of March 30, 1802 therefore plainly depends upon the understanding of previous acts reviewed above and is integrally tied, in its interpretive context, to the law prohibiting individuals from inciting the tribes passed in 1800. As a counter-measure to cement the friendship of the Indians, therefore, Section 13 assumes the status of a legal responsibility of affirmative action by the President in his relationship to Indian tribes.

This interpretation is further supported by the Act of March 3, 1813[18] which gives the President of the United States the power "to cause full and ample retaliation" for "any violations of the laws and usages of war, among civilized nations," which "shall be or have been done and perpetrated by those acting under authority of the British government." Section 2 makes specific provisions:

> Sec. 2. And be it further enacted, That in all cases where any outrage or act of cruelty or barbarity shall be or has been practised by any Indian or Indians, in alliance with the British government, or in connection with those acting under the authority of the said government, or citizens of the United States or those under its protection, the President of the United States is hereby authorized to cause full and ample retaliation to be done and executed on such British subjects, soldiers, seamen, or marines, or Indians, in alliance or connexion with Great Britain, being prisoners of war, as if the same outrage or act of cruelty or barbarity had been done under the authority of the British government.

D. Post War of 1812 Period

Following the War of 1812 the United States and Great Britain, in the Treaty of Ghent in 1815,[19] agreed that each government should restore its Indian opponents to the political status which they enjoyed during the war and prior to it. Treaties signed in 1815 as part of the United States effort to fulfill its Ghent Treaty obligations restored and made whole again the "peace and friendship" articles under which the civilization fund had been justified.[20]

Two statutes reflect this new status of the post war period. The Act of March 3, 1817[21] provided for the punishment of crimes and offenses committed within the Indian boundaries and expanded the authority of the governors of the territorial districts which were outlined in Sections 14 and

15 of the Act of March 30, 1802. The Act of April 16, 1818[22] provided that "the Superintendent of Indian trade, the agents and assistant agents of Indian trading houses, and the several agents of Indian affairs, shall be nominated by the President of the United States, and appointed by and with the advice and consent of the Senate." In the historical context in which this statute occurs the Senate in exercising its "advise and consent" powers over major appointments, indicates that the United States recognizes that the political status of the tribes has not been seriously impaired.

The Act of March 3, 1819[23] is extremely important in determining the legal responsibility of the United States in the field of Indian education. The act is designed to provide "against the further decline and final extinction of the Indian tribes, adjoining the frontier settlements of the United States, and for introducing among them the habits and arts of civilization."

The President of the United States is authorized in every case that he deems suitable and "that the means of instruction can be introduced with their own consent":

> to employ capable persons of good moral character, to instruct them in the mode of agriculture suited to their situation; and for teaching their children in reading, writing, and arithmetic....

Instead of remaining at arm's length in assuming responsibility for the continued existence of Indian tribes, the United States, with this statute, begins to develop its domestic law to provide for eventual incorporation of Indians into its social and political system. The statute does not forsee serving individual Indians on an equal basis with other citizens but views the services it is willing to provide as undergirding already existing tribal social and political structures.

The provision for Indian consent follows the general treaty guidelines but incorporates the thinking of the Northwest Ordinance in demonstrating the utmost good faith in determining Indian wishes. We can view this statute as a watershed in the relationship between Indian tribes and the United States government. Prior to the Act of March 3, 1819, statutes and federal regulations are based almost exclusively on the treaty relationship. Most of the laws have a tangential relationship in identifying and clarifying the roles to be played by the various government departments in fulfilling the treaty obligations in that creation of the War Department or the Purveyor of Public Supplies by statute is not required by any Indian treaty. Nevertheless upon creation of those offices and departments they are given a responsibility to perform certain functions required of the United States by different treaties.

The Act of March 3, 1819 is a voluntary and universal act which does not identify any specific treaty or treaty responsibility but which is designed to assume, unilaterally on the part of the United States, certain responsibilities and functions heretofore not defined or clarified by law. The subsequent history of federal legislation and succeeding treaties signed with Indian tribes shows that as the nature of treaties changes and their relative importance declines the unilateral assumption of the United States for all social and educational services increases.

It is interesting to note that in this, the most basic of all civilization and general welfare statutes affecting Indians, no mention is made of "treaty" tribes or "federally recognized" tribes. Rather the program derives from a need to prevent the extinction of the tribes adjoining the frontier. The courts have held that this statute covers all tribes whether they held any treaty relations with the United States or not and from this statute comes the authority of the federal government to provide services for all Indians, regardless of location or previous legal relationship with the United States.

In the prolonged litigation between the Sioux Nation and the United States this very point became an issue and the Court of Claims left little doubt how the statutory history was to be regarded:

> In statutes enacted and in the treaties made subsequent to the act of August 7, 1789, and to the present time, these officers and employees engaged in the administration and enforcement of laws, treaties and regulations, have been considered and recognized by the United States and the Indians as officers and employees of the Government; and the Agency facilities, equipment, and supplies have likewise been regarded as obligations of the Government either as expenses necessary and incidental to fulfillment of the obligations assumed by the Government under treaties and acts of Congress, or as necessary and incidental governmental expenses in the discharge by the United States of the obligations assumed as a party to the various treaties or in its sovereign capacity as the guardian or trustee for the Indians, to protect them through the enforcement of all federal laws and regulations.

* * * *

> In 1822, 3 Stat. 679, Congress abolished the Trading Houses and thereafter, as had been the case before, officers in the Military Service of the War Department, known as Indian agents and subagents together with certain other employees, maintained posts or agencies at various places among the Indian tribes. This, for the most part, was true whether the tribes were, at the time, in treaty relation with the United States or not.[24]
> (Emphasis added)

The two ideologies, treaty rights and special responsibilities for Indians, become intertwined beginning with this statute and so it becomes impossible to distinguish the legal responsibility of the United States based on one theory from its legal responsibility derived from the other theory. Treaty proceedings and negotiations which will be covered below indicate elaborate promises on the part of the treaty commissioners to provide all manner of services and goods to the respective tribes. We can infer from the minutes of the different treaties and agreements that the United States Commissioners sent to negotiate treaties knew of the existence of the Civilization Fund and that they had this fund and the expanding programs of the Indian Service in mind when they made promises to the different chiefs and headmen of the tribes.

The provisions of treaties and agreements which make special mention of education must therefore be seen in a dual aspect. The United States makes specific promises which can be identified by article of treaties and agreements. These are the special tribal rights which accrue to tribes on a document by document basis and reflect specific bargaining by the tribes.

There is also a general promise contained in both the peace and friendship articles and in the educational articles to include the members of the different tribes in the general program of the United States for Indians to prevent their extinction. This general program, while created as a gratuity to any particular tribe, becomes a legal responsibility with a basis in bargained treaty rights because it is the program with which the United States attempts to define its relationship to Indian tribes. Indians, at treaty negotiations, take two basic rights: 1) specific provisions on a tribal basis, and 2) rights to participate in the general program established by the United States for all Indians.

A small pox epidemic among the tribes resulted in the passage of a special act, the Act of May 5, 1832[25] which directed the Secretary of War to employ as many physicians and surgeons as necessary to vaccinate the tribes against the disease. Again this statute was addressed to preserving the tribes against extinction and was the first formal acknowledgment by the government of a responsibility for the health of Indians. The duty to provide medical services cannot be considered as gratuitous for if Indians understood that they were subject to exotic sicknesses when in contact with the white man future negotiations would have proven very difficult.

July 9th, 1832 saw the creation by statute of a Commissioner of Indian Affairs.[26] His mission was to "have the direction and management of all Indian affairs, and of all matters arising out of Indian relations." But this job description did not mean a reduction in the responsibilities of other government departments for tasks assigned them by Congress respecting Indians. Section 3 of the act directed the Commissioner of Indian Affairs to pass his vouchers for expenditures to the "proper accounting officer of the Treasury Department," the State Department continued to keep the records of the treaties, and territorial governors still had a dual role of governing their respective territories and acting as temporary Indian agents during the interim period.

Two years later the Act of June 30, 1834[27] was passed redefining the trade and intercourse regulations with the Indian tribes and establishing the legal definition of "Indian country" as:

> ...all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished....

Passports were re-established by section 6 of the bill but for foreigners rather than for American citizens. The statute acted as an omnibus law to bring all previous statutes in line with each other and to extend and elaborate on certain provisions, such as liquor sales, licenses, and purchases from individual Indians, which had previously composed the hodgepodge of federal Indian laws.

Another act passed the same day[28] provided for the organization of the department of Indian Affairs. This statute defined the various agencies which the United States was required by law and treaty to maintain and provided for interpreters, blacksmiths, farmers, teachers, and mechanics where they were required by treaty commitments. Two provisions of the statute are of particular interest. Section 9 requires the following procedure in hiring to be observed:

> And in all cases of the appointments of interpreters or other persons employed for the benefit of the Indians, a preference shall be given to persons of Indian descent, if such can be found, who are properly qualified for the execution of the duties. And where any of the tribes are, in the opinion of the Secretary of War, competent to direct the employment of their blacksmiths, mechanics, teachers, farmers, or other persons engaged for them, the direction of such persons may be given to the proper authority of the tribe.
> (Emphasis added)

Indian preference in employment and the right to self-government in directing Indian programs was an integral part of the revised program for Indians of the new department of Indian Affairs.

In addition to these provisions the President was once again given discretionary authority to furnish "useful domestic animals and implements of husbandry" to any "friendly Indians west of the Mississippi river, and north of the boundary of the Western territory, and the region upon Lake Superior and the head of the Mississippi." The pattern of program development discussed above was thus renewed and made applicable to tribes in the interior of the continent which had not yet had any formal dealings with the United States. The provisions of this statute demonstrate that the incorporation of treaty provisions into a general program of services to Indians by the United States was the method that would be followed in dealing with any remaining tribes.

In 1847 Congress passed another act[29] for the "better organization of the Department of Indian Affairs," and the

Secretary of War superintendencies was authorized to establish agencies and sub-agencies either "by tribes or geographical boundaries." Liquor traffic was further suppressed and Indians were made competent witnesses in liquor cases arising under federal laws. The Secretary of War was given a special fund of $5,000 to "collect and digest such statistics and materials as may illustrate the history, the present condition, and future prospects of the Indian tribes of the United States." Whether this fund marks the first allocation of federal funds for research or not can be argued. What may be of more importance is the assumption of the responsibility by the United States to give serious consideration to the future of its Indian program.

The Act of March 3, 1849[30] created "a new executive department of the government of the United States, to be called the Department of the Interior." Section 5 of that act declared:

> That the Secretary of the Interior shall exercise the supervisory and appellate powers now exercised by the Secretary of the War Department, in relation to all the acts of the Commissioner of Indian Affairs; and shall sign all requisitions for the advance or payment of money out of the treasury, on estimates or accounts, subject to the same adjustment or control now exercised on similar estimates or accounts by the Second Auditor and Second Comptroller of the Treasury.

While the Bureau of Indian Affairs was transferred intact to the new Department of the Interior, army officers continued, in many cases, to be appointed as Indian agents, the Treasury Department continued to handle Indian moneys derived from treaties, and the State Department continued to assume responsibility for keeping the records and documents of Indian treaties.

The following year Congress passed an act "authorizing the Negotiation of Treaties with the Indian Tribes in the Territory of Oregon,"[31] which authorized the President to appoint one or more commissioners to negotiate treaties with the Oregon tribes and "for obtaining their assent and submission to the existing laws regulating trade and intercourse...". The President was further authorized to appoint a "superintendent of Indian Affairs for the Territory of Oregon," with the advice and consent of the Senate.

Two years later Congress passed the Act of March 3, 1852[32] which revived and extended the powers to make treaties with Indian tribes already given the President under the Act of May 25, 1822, and made it applicable to the State of California. Again the President was given authority to appoint a "superintendent of Indian Affairs to reside in said state." The two statutes, taken together, indicate that it was not the policy of the government to simply extend its administrative services arbitrarily as part of a general program. Rather Congress, recognizing a legal obligation inherent in the acquisition of new territories, specifically provided for the addition of lands and tribes under its already existing legal obligations.

We have noted previously the intertwining of two legal doctrines, one an obligation to provide services based upon specific treaty articles, the other a general provision for services which is based more generally on both government policy as self-defined and upon the general charge to admit

Indians to peace and friendship with the United States. In the act of June 14, 1862[33] we see how the two policies of civilizing Indians and reserving to them certain rights derived from treaties worked in the practical area. This statute was designed to protect those Indians who had adopted the ways of civilization and taken an allotment in anticipation of following the "habits of civilized life."

Superintendents and agents were directed to "provide that such Indian shall be protected in the peaceful and quiet occupation and enjoyment of lands so allotted to him" The responsibility of the United States was thus not simply to admit tribes to its friendship but to make provisions that individual tribal members who received benefits from their tribe's treaties were allowed to enjoy those benefits. The principle which we have established here is the affirmative responsibility of the United States to guarantee to members of an Indian tribe the full benefits which their treaties give them especially where the quality of life is concerned.

The rapid settlement of the western United States, the severe disruptions created by the Civil War, and the failure of government programs to provide a smooth transition for some tribes from their previous mode of life to a competitive position with respect to their white neighbors, created a crisis in the government Indian programs at the end of the Civil War. Some tribes had exhausted their treaty annuities of former years and yet were not in a condition to provide for themselves.

In December 1865 Congress passed a Resolution[34] which directed the President to spend funds from the appropriations "heretofore made 'to enable the President of the United States to carry into effect the act of third of March, eighteen hundred and nineteen, and any other acts now in force for the suppresion of the slave-trade,'" for "the immediate subsistence and clothing of destitute Indians and Indian tribes within the southern superintendency." This diversion of non-Indian funds on the basis of the old "Civilization Act" of 1819 marked a new departure of the United States in its Indian policy. The precedent was established that Congress could allocate funds other than those set aside for Indians to Indian purposes in order that its basic program be fulfilled.

By 1867 Congress recognized that it was engaged in a serious war with the Indian tribes of the Great Plains and Rocky Mountains. A special commission was established by the Act of July 20, 1867[35] and the President was authorized to send the commissioners west to negotiate treaties of peace with the tribes. The Secretary of War was directed to furnish the Commission with transportation, subsistence, and protection and the Secretary of the Interior was directed to provide subsistence to friendly Indians who were not hostile and who were seeking the protection of the United States.

The Indian Peace Commission or, as it is sometimes called, the Sanborn Commission, negotiated treaties with the Kiowa and Comanche[36], Kiowa, Comanche and Apache[37], the Cheyenne and Arapaho[38], the Utes[39], the Sioux and Arapaho[40], the Crows[41], the Northern Cheyenne and Northern Arapaho[42], the Navajo[43], and the Eastern Band of Shoshoni and Bannock[44], during the period of its existence. All of these treaties, which in the case of the northern plains are the famous "Fort Laramie" treaties, had strong provisions for educational services.

The consideration of these educational services was twofold. Not only did the United States seek certain land cessions, but it also sought a well-defined peace in the west which was impossible without the consent and cooperation of these tribes. If the "peace and friendship" provisions of any treaties apply to federal services for Indians, these treaties are certainly foremost in considering this doctrine.

Indian Affairs following the Civil War had grown to an enormous size and it was no longer possible to coordinate the various functions of Indian programs by different departments. Government departments were of very small size during those years and as the demands of administration became heavier Congress decided to transfer the functions of the Secretary of the Treasury with respect to Indian matters to the Secretary of the Interior. The Act of July 27, 1868[45] transferred the duties and powers of the Secretary of the Treasury as defined by the Act of June 30, 1849 to the Secretary of the Interior.

E. Post Treaty-Making Period

In 1871, after several years of bickering between the Senate and the House of Representatives, a section was attached to the Indian appropriation bill[46] forbidding further making of treaties with Indian tribes on the basis that they were independent nations capable of negotiating treaties. But the act provided:

> That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.

In effect, therefore, the provision simply froze the treaty rights then in existence and presented the legal question, not yet satisfactorily resolved, of whether the rights remained somewhat above ordinary statutory rights because of their treaty origin or whether they did not thereby achieve some exalted status as vested property rights.

Following the prohibition of further treaty-making the Congress did make "agreements" which were interpreted by the federal courts as treaties and which the special agents appointed to negotiate with Indians informed the tribes were treaties. But the trend of legislation began to reflect an ideology based upon the conception of the individual tribal member rather than on rights of tribal groups themselves. Even though agreements were made for a period of forty years, from 1872 to 1911, more emphasis was placed on rights of individual tribal members.

The first important statute to indicate this new ideology was the Act of May 21, 1872[47] which defined the rights of individual Indians respecting the signing and enforcement of contracts with non-Indians. Contracts had to be approved in writing by the Secretary of the Interior and the Commissioner of Indian Affairs and federal district attorneys were delegated the responsibility to sue on contracts which did not follow the procedure that was outlined in the act.

In 1873 the Secretary of the Interior received additional functions relating to Indians which had been previously handled by the State Department. The Act of March 1, 1873[48] gave him the authority to perform all the duties in relation to the Territories "that are now by law or by custom exercised and performed by the Secretary of State. The chief effect of this law with respect to the Indian tribes was that the treaties and agreements would thereafter be a responsiblity of the Interior Department rather than the State Department.

That same year, 1873, a dispute arose with respect to the fulfillment of treaty obligations in the field of education which were to have been carried out by the American Baptist Home Mission Society for the Ottawa Indians of Blanchard's Fork and Roche de Boeuf. A special investigating commission of five men was appointed and they were given instructions to reach an equitable settlement between the Indians and the missionary group regarding the division of lands and moneys which had been set aside for educational purposes. Establishment of this commission by statute[49] indicated that the educational provisions of Indian treaties were regarded by Congress as capable of being enforced legally and gave a good indication of the property aspects of Indian treaty articles in a legal sense.

Part of the controversy over the Ottawa treaty provisions and Ottawa University in Kansas was that there was very poor accounting of stocks and bonds owned by the tribe and purchased with tribal moneys. To forestall any future problems with these negotiable instruments Congress passed a statute, the Act of June 10, 1876[50] which transferred back to the Secretary of the Treasury certain aspects of Indian affairs. Under the provisions of the statute the Secretary of the Interior was issued certificates of deposit as a "trustee for various Indian tribes." But the Indian funds were henceforth the responsibility of the Treasurer of the United States, not the Secretary of the Interior.

This statute marks another watershed in the legislative history of Indian relationships with the federal government. Control over Indian matters had steadily accrued to the Department of the Interior since 1849 and, as we have seen, the Secretary of the Interior had assumed responsiblity for various functions which had previous been performed by other departments of government. With this statute the Congress re-opened the responsibilities of other government agencies and re-affirmed the principle that the treaties and even the trust responsibility for Indian matters were subjects of the whole government and not simply affairs of the Interior Department.

Later legislation often committed specific tasks to the Interior Department but just as often Congress directed tasks to agencies, bureaus and departments unrelated to the Interior Department. As tasks were allocated according to function, the legal obligation which arose out of the early treaties and civilization acts attached to the new functions of other departments and the federal trust responsibility carried over to the programs of the other departments.

The act of July 31, 1882[51] is a case in point. Although Indian Affairs were under the Secretary of the Interior, this statute authorized the Secretary of War to set aside any vacant posts of barracks which were not required by the Army for use in the establishment of normal and industrial training schools for Indian youth from the "nomadic tribes having educational treaty claims upon the United States." Army officers were to be detailed to serve part of their duty in connection with the educational services although under the direction of the Secretary of the Interior.

The statute was curious in that the schools were set aside for nomadic tribes having educational provisions in their treaties and yet the schools were to be operated with funds "appropriated or to be appropriated for general purposes of education among Indians." Operation of the schools did not, therefore, depend upon the specific money items listed in the treaties of the tribes whose children were eligible under the statute. Rather the funds for the schools came from the general program funds of the Bureau of Indian Affairs.

This statute demonstrates rather explicitly the theory advocated above of the intertwining of treaty rights and general educational "civilization" policy which began in 1802 and was expanded in 1819. With the administrative merger of treaty rights and general obligations of the federal government in the educational programs that revolved about this boarding school provision, it became impossible to distinguish which services were gratuitous on the part of the federal government and which were direct results of an effort to fulfill the requirements of the treaties. In reality all programs became part of a larger effort to fulfill legal obligations.

The only major land area claimed by the United States and not under a specific statutory organization was Alaska which had been purchased by the United States from Russia in 1867. At the time of the purchase the United States promised it would protect the rights of the Alaska Natives and in 1884 Congress finally passed a statute defining the nature of civil government in Alaska.[52]

Three provisions of the Act affected Indians and Eskimos. Section 8 preserved the lands of the Natives until the Congress could make provisions for them. Section 12 required that the Secretary of the Interior select two officers who, with the governor of the territory, constituted a commission to "examine into and report upon the condition of the Indians residing in said Territory, what lands, if any, should be reserved for their use, what provision shall be made for their education..." Finally Section 13 provided that the Secretary of the Interior should make provisions for the education of all children of school age "without reference to race." Outside of the extension of the federal Indian liquor statute the Alaska Civil Governement Act made little reference to the large body of then established Indian law which had developed in the continental United States. The rights of the Alaska Natives were preserved until such time as Congress was able to determine how to best define them.

This statute was greatly expanded by the Act of January 27, 1905[53] which provided for the construction and maintenance of roads and the establishment of schools in Alaska. Under this new statute the governor of Alaska became the ex officio superintendent of public instruction in the territory and all the income from liquor licenses, occupation and trade licenses in the territory was placed in a separate fund known as the Alaska Fund. The governor was authorized to draw at least one quarter of the money for the establishment and maintenance of schools under his direction. Provisions were made for the election and operation of school boards in the incorporated towns of the territory.

Perhaps the most fundamental change which this new statute brought was the segregation of Indian and Eskimo children. The old provision of education without regard to race was repealed by Section 7 of the new act:

> That the schools specified and provided for in this Act shall be devoted to the education of white children and children of mixed blood who lead a civilized life. The education of the Eskimos and Indians in the district of Alaska shall remain under the direction and control of the Secretary of the Interior, and schools for and among the Eskimos and Indians of Alaska shall be provided for by an annual appropriation, and the Eskimo and Indian children of Alaska shall have the same right to be admitted to any Indian boarding school as the Indian children in the States or Territories of the United States.

Thereafter Indian and Eskimo children were educated in a school system operated by the Department of the Interior and various missionary groups that were authorized to provide educational services for them.[54]

As an expansion of the law to use abandoned military posts and barracks for the education of Indian children from the nomadic tribes, Congress passed a Resolution, in 1884[55], which authorized the Secretary of the Interior to expend moneys appropriated for instructing and civilizing Indian children dwelling west of the Mississippi River, for erecting, furnishing, and repairing schoolhouses already under construction or under contract. For the most part these schools were built on reservations or near large concentrations of Indians.

By the end of the century there was fierce competition for school lands and lands within Indian reservations became subject to state encroachment when they were classified as "school lands." The Act of March 2, 1901[56] allowed a state to test its rights to school lands without joining the tribe as a party if the Secretary of the Interior was made a party. However the duty of representing the tribe affected fell to the Attorney General under the statute again indicating a division of the trust responsibility for Indians.

F. Citizenship Period

In the first two decades of this century citizenship for Indians became a dominant theme in the minds of federal officials. Part of this concern derived from the provisions of the General Allotment Act of 1887[57] which established a trust period for allotments and provided United States citizenship at the end of this period. Since many of the agreements negotiated under the general provisions of this act were approaching the end of the trust period, it appeared that many Indians would be terminated from their tribal relations within the foreseeable future.

The Burke Act[58] gave the Secretary of the Interior power to shorten the period of trust for allottees he regarded as competent. During the first three years of operation under the Burke Act over 60% of the Indian allottees disposed of their lands and its proceeds.[59] With the assumption of citizenship the right to federal services was thought to be lost to the individual Indians and federal officials saw the act as a means of phasing out the responsibilities of the federal government for Indians.

The First World War brought about a further drive for citizenship by Indians and the Act of November 6, 1919[60] gave citizenship to every American Indian who served in the military during the war and had received an honorable discharge. It is interesting to note that the statute exempted individual rights to "the property rights, individual or tribal, of any such Indian or his interest in tribal or other Indian property." When the Indian Citizenship Act was passed in 1924[61] the same provision was inserted thus preserving for Indians the rights derived from treaties and general federal programs to educational and other benefits. With citizenship, therefore, the tribal members had a dual system of rights. They preserved their tribal rights which were derived from treaties and they were given the rights of ordinary citizens to services which non-Indian citizens received.

The rapid push to create landless Indian citizens which had been the goal of the Burke Act resulted in a multitude of Indians who were living in poverty without any definite federal responsibility for them. To remedy this situation Congress passed the Snyder Act in 1921[62] which once again reaffirmed the general responsibility of the United States for American Indians. The preamble of this statute bears reading:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians througout the United States for the following purposes....

The statute then listed nine broad classifications of programs which the Bureau of Indian Affairs was to administer.

The Snyder Act has recently come into favor again as both Indians and federal officials attempt to relate present programs to the historical developments in the field of Indian Affairs. Its importance cannot be underestimated. First, the act did not make distinctions between Indians then living on reservations or holding trust allotments and those who lived off reservation or who had sold their trust allotments. It thus brought together in one general statute all the authority and responsibility of former laws regarding Indians and federal services. As such it can be said to have incorporated all former treaty provisions and general programs from whatever source into a national policy to assist Indians.

Second, the act provided almost unlimited discretion in the manner in which the Bureau of Indian Affairs could move to fulfill its basic task of providing benefits, care and assistance to Indians. From this general charge to take care of Indians, Congress reserved the right to direct any other agency to perform specific tasks in the field of Indian Affairs.

G. Reform Period

The Great American Depression provided the basis for a radical change in the relationship of Indians to the United States. While there had been a preservation of tribal self-government in most tribes the multitude of rules and regulations which had arisen in the decades since the treaties made it extremely difficult for tribes to govern themselves. The previous trend of federal policy had been to seek ways of avoiding legal obligations to Indians by eliminating individual Indians from tribal membership and therefore from eligibility for federal services.

Two major statutes symbolized the reforms of the New Deal, the Wheeler-Howard Act[63] and the Johnson-O'Malley Act[64]. The Wheeler-Howard Act provided a basis for formalizing tribal self-government under the supervision of the Secretary of the Interior and clarifying the powers of reservation governments. The Johnson-O'Malley Act authorized the Secretary of the Interior to contract with states and territories to provide "education, medical attention, agricultural assistance, and social welfare, including relief of distress, of Indians in such State or Territory."

The Wheeler-Howard Act was not as revolutionary as was originally supposed. Most tribes had had some type of government since the early reservation days but these governments were not always given the respect they should have received. Under the act the Secretary of the Interior received specific powers of supervision over tribal governments in return for which the government provided loan funds for economic development, prohibited allotment of tribes accepting the provisions of the act, and made provisions to extend the period of trust over the lands until Congress should remove the restrictions. But the final version of the act was quite different from John Collier's (Roosevelt's Indian Commissioner) original proposal and thus it provided as much material for controversy as had the myriad of smaller acts which it purported to supercede.

The Johnson-O'Malley Act contained within itself the political ideology that was to dominate the next generation as it tried to find suitable agencies to administer services to Indians. Two years after its passage an amendment[65] expanded the types of organizations which could receive contracts from the Secretary of the Interior to provide services to Indians. They included "... any State or Territory, or political subdivision thereof, or with any State university, college, or school, or with any appropriate State or private corporation, agency, or institution."

Johnson-O'Malley indicated that the trend in congressional thinking was now moving in the direction of allocating service functions to a variety of agencies. It would be another generation before tribal governments became the prime contracting agencies for administration of federal services but in this amendment of the Johnson-O'Malley Act we can see very clearly the direction of federal program development.

The major omission of the Johnson-O'Malley Act was its failure to provide authority to the Secretary of the Interior to expend funds for school construction. He was authorized to use existing facilities but not to contract for construction of new facilities. In the years following the passage of the amendment there were several bills passed which allowed school construction on the basis that school districts would thereafter admit Indian children on an equal basis.

H. The Modern Period

During the Second World War the federal government built a large number of military posts and otherwise radically altered the American landscape by shifting war industries and federal activities to certain parts of the country. In 1941 Congress passed the Lanham Act[66] which was designed to provide federal assistance to those areas which had a tremendous influx of people because of their employment in war-related activities.

The 81st Congress, struggling with continued federal impact on local communities because of the Cold War need to maintain a strong military defense, passed two major pieces of legislation designed to assist school districts that were affected by federal activities. P.L. 81-815 provided funds for school construction in areas affected by federal activities and P.L. 81-874 provided federal assistance in the maintenance and operation of schools that were suffering from the impact of federal operations. In the initial statutes the federal activities of the Bureau of Indian Affairs and other ongoing agencies were not considered in the same category as the defense activities.

P.L. 81-874 was amended in 1953[67] to provide that funds could be used for Indian education but the amendment did not make adequate provisions for Indian education because under its provisions if a State accepted funds from 874 they were then barred from accepting funds from the Johnson-O'Malley Act. Governors of different states had to make a determination, in advance of student census or other considerations, whether all schools would seek assistance through 874 or Johnson-O'Malley sources.

1953 saw a radical change in congressional thinking about the federal obligations to Indians which seemed in many ways to contradict the expansion of services which was taking place in the field of education. The 83rd Congress initiated the policy of termination of federal responsibilities for Indians. A part of the contemplated withdrawal of federal responsibilities was seen in P.L. 83-280[68], a bill which gave civil and criminal jurisdiction over Indian reservations to some states and allowed other states, by amending their constitutions, to assume jurisdiction over the tribes and reservations in their states. Indians received a partial amendment of P.L. 280 in 1968 under the Civil Rights Act of that year and are currently seeking total repeal of the statute.

The following year, 1954, Congress transferred the responsibility to provide health services to Indians from the Bureau of Indian Affairs to the U.S. Public Health Service.[69] The

Public Health Service had provided personnel to the Bureau of Indian Affairs since 1926[70] when expanded medical services began to be made available to Indians and so the transition was not a radical step in reorganization.

In 1958 the problems raised by the exclusionary clauses of 874 were changed by a major amendment of 874 and 815. P.L. 85-620 was passed and had two major titles. Title One revised and updated 815 to provide new formulas for figuring federal contributions and Title Two revised 874 and exempted Johnson-O'Malley payments from the definition of "other federal moneys" which disqualified school districts applying for funds under the program.

Perhaps the major and most innovative aspect of the 1958 amendments to 815 and 874 was the delegation by Congress to the Commissioner of Education in H.E.W. of a major responsibility in the field of Indian education. Indian funds and programs had generally been kept separate since the passage of the Indian Reorganization Act because Congress had anticipated that most of the problems would be solved by that law. However it soon became apparent that the programs operated under the Indian Reorganization Act were inadequately funded and did not take into account the long decades of neglect when little capital construction had been made on reservations.

The trend developed in the late 1950's and early 1960's to amend pieces of general legislation to provide for the inclusion of Indian tribes as sponsoring agencies or to provide special funds and eligibilities for Indians. The general doctrine of interpretation of federal statutes, which we will cover below, maintained that Indians were not affected by general legislation unless they were specifically mentioned. The inclusion of Indians in general legislation beginning with the amendments of 815 and 874 paved the way for additional programs to fill specific needs for Indians.

Indians were included in the Area Redevelopment Act[71], approved May 1, 1961, and later in the revised version of A.R.A., the Economic Development Administration. Indians were included in a special category in the Economic Opportunity Act of 1964[72], were also included in the Housing Act of 1964[73] and were exempted from the Civil Rights Act of 1964[74]. The expansion of services to Indians during the 1960's spread from the Interior Department outward to include most of the major government departments.

The major innovation of the 1960's was the Elementary and Secondary Education Act of 1965 with its subsequent amendments in 1966, and succeeding years, the latest amendments being in 1970.[75] The theory of the Elementary and Secondary Education Act stemmed directly from the Act of September 30, 1950[76] in that the policy of the federal government recognized "the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs," rather than simply federal activity.

It would have been easy to designate eligibility requirements simply by income without making a special section applicable to Indian children. However the inclusion of Indian children in the provisions of the act meant a sharing of responsibilities between the Secretary of Health, Education and Welfare and the Secretary of the Interior indicated that Congress had chosen to divide the federal legal obligation between two major government departments.

The fact that appropriations to the Bureau of Indian Affairs for education were not simply increased but that the Secretary of Health, Education and Welfare was designated as the first responsible government official, acting, in effect, as the supervisor of the Secretary of the Interior, meant that the original division of legal responsibility for fulfilling obligations to Indian tribes among various federal departments was being revived in order to precisely locate the location of various trust functions.

I. Conclusion

We will turn in succeeding sections of this paper to the articles of treaties dealing with educational services and the manner in which Congress has traditionally allocated the legal obligations of both treaties and statutes to the different departments of the government. Finally we will review the legal responsibility of the United States as it is seen in the messages of the Presidents, in case law, and in the generally accepted doctrines of interpreting treaty and statutory law. All of the succeeding sections must be viewed, however, in the general context of the legal history which we have reviewed in this section of the paper. In that way the present situation of Indians and their rights to federal services will be understood as part of an ongoing historical process rather than as a temporary diversion of services from the Interior Department to other government departments and agencies.

II. TREATY RESPONSIBILITIES FOR EDUCATION OF INDIANS

There are numerous educational articles in ratified Indian treaties, education figures quite prominently in ratified agreements, and the unratified treaties and agreements frequently contain educational provisions. For the most part the Court of Claims and the Indian Claims Commission have not regarded educational articles of treaties as rights capable of being measured in monetary damages.[1] Since the educational rights are a definite part of the treaty negotiations and, as an integral part of treaties, must have some effect in law, their legal status must be that of a continuing right.

Educational treaty case law does not indicate much development until the present era when suits begin to reflect efforts to get the courts to interpret the procedures under which educational services must be given. In a real sense, then, we are at the beginning of an era in which educational services will possibly become the subject of an expanding area of litigation.

The tendency of courts today is to allow considerably more evidence into the record regarding the understanding by the Indians of what the treaty meant. The major fishing rights case of recent years, United States v. Washington,[2] has massive documentation concerning the culture and life style of the Indians of the area, how they would have understood the promises of the United States treaty commissioners, and what their expectations were regarding services and rights under the treaty. The recent trials revolving about the occupation of Wounded Knee have also seen the introduction of massive amounts of evidence to indicate what the Indians understood the treaty meant.

With case law developing in a regular and consistent manner regarding the understanding of Indians concerning the treaty provisions we must take a futuristic look at the various educational provisions of treaties. One thing seems relatively certain: although the treaty articles may have definite time limits in which the services are to be performed, one cannot date the time for performing the services from the date of ratification of the treaty.

In many instances the government did not begin to perform its function as educator until long after the treaty was ratified[3] and thus the definite term of years stated in the educational articles cannot be said to have lapsed without further investigation into the nature and extent of the services rendered. In other instances there was no mention to the Indians at the time of signing the treaty that they would have a limited number of years to receive the services, particularly in the field of education. They assumed, as often did the United States Commissioners, that the definite time period mentioned was simply a way of indicating that the services would continue until the tribe was adequately educated.

We must therefore examine, insofar as it is possible, the recorded statements of both Indians and federal officials concerning the meaning of the educational provisions to determine, if possible, the understandings which were shared at that time concerning education. The first problem that arises is simply that of the number and extent of the records which have survived. Not all treaty negotiations were recorded.[4] In many instances the commissioners wrote letters back to the Commissioner of Indian Affairs, their immediate military commander, the governor of the territory, or sometimes even the President, relating the substance of the discussions and mentioning, sometimes in the most casual manner possible, the promises made to the Indians.

Since we do not have accurate records for many of the treaties, we will examine the treaties for which some material relating to oral promises remains. We can only assume, but with good reason, that the other promises were similar in nature and content even though they were not recorded. It is in the nature of the field of historical research into the legal status of Indian tribes that materials are available in archives other than the federal government. Many of these materials, however, are uncataloged, do not have precise titles when they are listed, or are derived from such sources as missionaries diaries, early newspaper accounts, and autobiographies which, although accurate and contemporary, are not directly related to the interpretation of Indian treaties and therefore remain unknown.

Unless a definite legal problem arises in which certain historical actions must be understood there is no way to begin to look for materials that would relate to the treaties. Once a problem arises and a researcher knows precisely what he is looking for, the gathering of materials to interpret treaties becomes relatively easy. Therefore it is not outside the realm of possibility that much additional material covering treaties which presently do not have adequate documentation will be uncovered in the future.

In order to make the format of our discussion easy to follow, we will develop samples of the treaty articles and recorded statements by treaty, indicating first the complete text of the article concerning education and then placing the recorded statements of explanation below it to illuminate the understanding of both the Indians and the treaty commissioners concerning its meaning.

Ratified Treaty with the Cherokees, February 27, 1819
(7 Stat. 195)

ARTICLE 4

> The United States stipulate that the reservations, and the tract reserved for a school fund, in the first article of this treaty, shall be surveyed and sold in the same manner, and on the same terms,

> with the public lands of the United States, and the proceeds vested, under the direction of the President of the United States, of such stock as he may deem most advantageous to the Cherokee nation. The interest or dividend on said stock, shall be applied, under his direction, in the manner which he shall judge best calculated to diffuse the benefits of education among the Cherokee nation on this side of the Mississippi.

The Cherokee chief, Path Killer, wrote a letter to U.S. Commissioner Joseph McMinn relating the promises of Mr. Densmore, a previous commissioner sent by the President in an earlier treaty negotiation:

> He also promised to have schools established to educate our children and now we (have) schools in our country, I am very much pleased with the progress of the civilization of my nation. (Letter, July 12, 1818)[5]

McMinn, the U.S. Commissioner, wrote a letter to the Cherokees to be read in open council in November 1818, three months prior to the signing of the treaty, in which he related the following:

> ...and if we believe the Holy Book to be true, every Heathen shall know the great Spirit, and shall bow his knee before him, and this knowledge can only be acquired in the first instance, by turning your attention as I have described, and by procuring a competent education for your children and raising them to understand industry and their moral obligations toward one another.
>
> Here then my Brothers is your true situation this immense newly discovered Country will form sufficient inducements to all who wish to follow the hunters life to remove thither; where they will have schools established for the education of their youths, while you who have seen the folly and felt the toils of the gun & the chase can stay with us here entirely undisturbed by the bad examples which seems to accompany the hunters life; as well with white as red people, here you will enjoy the advantages of equal & just laws, here you will find morality & religion, respected & vice punished to the full extent.[6]

That letter not having proven sufficient to induce the Cherokees to sell their lands, McMinn wrote a second letter to the Cherokee National Committee of Chiefs and Warriors emphasizing the benefits of a different education.

> Brother, reason & prudence are the Monitors by which all prudent people and individuals ought to be guided. We know however that conscience is but the force of education, religion is certainly commendable, but the force of our prejudices forbid that you should at once expect to see us embrace yours. We like yourselves found ours upon our prejudices & follow the religion of our Fathers, a different education would beget different prejudices and with your education we should no doubt adopt your prejudices as well as religion. This however is not to be expected in the pursuit of game in a wilderness.[7]

> Ratified Treaty with the Chippewas, September 24, 1819 (7 Stat. 203)
>
> ARTICLE 8
>
> The United States engage to provide and support a blacksmith for the Indians, at Saginaw, so long as the President of the United States may think proper, and to furnish the Chippewa Indians with such farming utensils and cattle, and to employ such persons to aid them in their agriculture, as the President may deem expedient.

Governor Lewis Cass who negotiated the treaty wrote a long letter of explanation to John C. Calhoun, then Secretary of War, outlining the difficulties he had had in negotiating the treaty and reporting the promises he had made to the Chippewas. Portions of his letter are illuminating.

> That portion of the Chippewa Indians, which owned this land, have not made the necessary advances in civilization to appreciate the importance of education for their youth. It was therefore hopeless to expect from them any reservations for this object, or to offer it as an inducement for a cession of their country. Some considerations more obvious in its effects, and more congenial to their habits was

> necessary to ensure a successful termination to the negotiation.[8]
>
> Viewing the subject in this manner, I finally concluded to admit a stipulation, conformably to their wishes, for an annuity of One Thousand dollars, but to secure the payment of whatever additional sum the Government of the United States might think they ought to receive, in such a manner, as would be most useful to them.
>
> A stipulation therefore was inserted, that the United States should provide and support a Blacksmith for them, and should furnish them with cattle, farming utensils and persons to aid them in agriculture.
>
> The amount, which shall be expended for these objects by the United States, the term during which this expense shall continue, and the mode in which it shall be applied are left discretionary with the President.[9]

Cass, later in his letter, changes his story somewhat about the Indians appreciating the importance of education, for he notes:

> It is due to the Indians and to myself to say, that the sum, which it was expected by us, would be expended for the objects which I have mentioned, is from fifteen hundred to two thousand five hundred dollars annually. But they distinctly understand that the amount of this expenditure is entirely discretionary with the President. Of course the Government can now apply such a sum to these objects, as the value of the cession, and the wants and population of the Indians may justify.
>
> In the meantime we may teach them those useful arts which are connected with agriculture, and which will prepare them by gradual progress for the reception of such institutions, as may be fitted for their character, customs & situation.[10]

The measurement, according to Cass' understanding, of the Indians rights to services, depends on the relationship of two factors, -- the value of the lands ceded and the wants of the Indians. And he relates that the Indians are content to have the President have discretionary powers in relating these factors for them.

> Ratified Treaty with the Choctaws, October 18, 1820 (7 Stat. 210)
>
> ARTICLE 7
>
> Out of the lands ceded by the Choctaw nation to the United States, the Commissioners aforesaid, in behalf of said States, further covenant and agree, that fifty-four sections of one mile square shall be laid out in good land, by the President of the United States, and sold, for the purpose of raising a fund, to be applied to the support of the Choctaw schools, on both sides of the Mississippi river. Three-fourths of said fund shall be appropriated for the benefit of the schools here; and the remaining fourth for the establishment of one or more beyond the Mississippi; the whole to be placed in the hands of the President of the United States, and to be applied by him, expressly and exclusively, to this valuable object.
>
> ARTICLE 8
>
> To remove any discontent which may have arisen in the Choctaw Nation, in consequence of six thousand dollars of their annuity having been appropriated annually, for sixteen years, by some of the chiefs, for the support of their schools, the Commissioners of the United States oblige themselves, on the part of said States, to set apart an additional tract of good land, for raising a fund equal to that given by the said chiefs, so that the whole of the annuity may remain in the nation, and be divided amongst them. And in order that exact justice may be done to the poor and distressed of said nation, it shall be the duty of the agent to see that the wants of every deaf, dumb, blind, and distressed, Indian, shall be first supplied out of said annuity, and the balance equally distributed amongst every individual of said nation.

Treaty Commissioners Andrew Jackson and Thomas Hinds wrote to Secretary of War John C. Calhoun concerning the nature of the educational provisions of the treaty:

> When the treaty reaches you, we believe it will be found as advantageous in its provisions, as under existing circumstances, we had a right to expect. We have amply provided for them schools, on both sides of the Mississippi. This was an object truly

> desirable to the nation, and only appreciated by the Commissioners. Without providing for them, we were satisfied that we could not obtain the signature of the treaty, securing an exchange as therein proposed. We enclose with the treaty a plan of Missionary W. Cyrus Hingsbury, for establishing schools in the Choctaw nation, on both sides of the Mississippi River to which we beg leave to call your attention, and hope it will be adopted, as far as the funds will permit, when raised.
>
> We must here remark. that we found some dissatisfaction in the nation, in consequence of their principal chiefs having made a donation of part of the annuity for the support of these schools. For the purpose of producing harmony amongst them, by which alone our success could be secured, we proposed the article raising an equal fund and one thousand dollars more, as an annuity for sixteen years. This produced all the good effects which were anticipated.[11]

Ratified Treaty with the Florida Indians, September 18, 1832 (7 Stat. 224)

ARTICLE 6

> An agent, sub-agent, and interpreter, shall be appointed, to reside within the Indian boundary aforesaid, to watch over the interests of said tribes; and the United States further stipulates, as an evidence of their humane policy towards said tribes, who have appealed to their liberality, to allow for the establishment of a school at the agency, one thousand dollars per year for twenty successive years; and one thousand dollars per year for the same period, for the support of a gun and blacksmith, with the expenses incidental to his shop.

William P. Duval, James Gadsden and Bernardo Segui were the United States Commissioners appointed by the President to negotiate the treaty. On September 6, 1832, during a council with the Indians, Commissioner James Gadsden explained the effect and meaning of this article to the assembled Indian delegates:

> He (referring to the President) will not permit you to be scattered all over Florida. He will place you by yourselves, mark your boundaries, protect your property, prevent his white men & the Creeks from disturbing you, Separate you from false prophets & bad men from across the water place an agent among you to let him know your wants; educate your children and give your those articles of clothing, Iron, lead, powder &c. of which you have a need.[12]

Ratified Treaty with the Choctaws, January 20, 1825 (7 Stat. 234)

ARTICLE 2

> In consideration of the cession aforesaid, the United States do hereby agree to pay the said Choctaw Nation the sum of six thousand dollars, annually, forever; it being agreed that the said sum of six thousand dollars shall be annually applied, for the term of twenty years, under the direction of the President of the United States, to the support of schools in said nation, and extending to it the benefits of instruction in the mechanic and ordinary arts of life; when, at the expiration of twenty years, it is agreed that the said annuity may be vested in stocks, or otherwise disposed of, or continued, at the option of the Choctaw Nation.

By 1825 the Choctaws had produced a number of leaders familiar with the English language and capable of presenting demands to the United States in their own terms. The Choctaw delegation wrote to John C. Calhoun proposing terms for educational provisions in January 1825:

> The terms which we propose are the following:
>
> 1. Six thousand dollars a year, perpetual annuity - that annuity to be sold or continued by the Choctaws, at their option, any time after twenty years.
>
> 2. The annuity of six thousand dollars for sixteen years, promised in the treaty of 1820, to commence the present year.

> 3. The extinguishment (as suggested by you) of all claims which you may have against individuals of the Choctaw Nation for debt due to the Trading House, in consideration that we relinquish our claim to have a Trading house established west of the Mississippi.
>
> 4. An equitable settlement of the Pensacola claims, and of all other just claims which may be presented.

> The foregoing are the principal conditions. There are others which we could wish granted; but upon which we would not insist with pertinocity. For instance; we would rather take money, and apply the interest to the purposes of education, than the fifty-four sections of land, provided to be set apart under the treaty of 1820.[13]

This letter marked the final proposition sent by the tribe to the United States prior to the signing of the treaty of 1825. A long period of negotiation had led up to the agreement on the education article and the letter of November 22nd of the previous year to Calhoun, which had initiated the discussion of terms, gave the thinking of the Choctaws on education.

> We make a direct proposition for the proposed cession west of the Mississippi. After the views we gave in the beginning of this letter, you will not be surprised that we think our terms reasonable. We ask, first, that thirty thousand dollars worth of goods be distributed as presents to our nation - $15,000 the first year & $15,000 the second. - Second that nine thousand dollars a year, for twenty years, be appropriated for the support of mechanical institutions among the Choctaws. Third - that the same sum be appropriated annually for twenty years, for the education of Choctaw children in colleges or institutions, out of the nation. Fourth, that three thousand dollars a year for twenty years, be appropriated for the education of Choctaws beyond the Mississippi, when they shall have settled there, and an agent appointed to live among them. These annuities to be applied, for the purposes expressed, under the direction of the President.
>
> The price we ask may be more than has been usually given for lands lying so remote. But it is not more than what we think to be their just value. We wish our children educated. We wish to derive lasting, if not transient,

> benefits from the sale of our lands. The proceeds of those sales we are desirous should be applied for the instruction of our young countrymen. It is for this important object that we may seem to you unreasonable in our proposition. We feel our ignorance, and we begin to see the benefits of education. We are, therefore, anxious, that our rising generation should acquire a knowledge of literature and the arts, and learn to tread in those paths which have conducted your people, by regular generations, to their present summit of wealth & greatness.[14]

Ratified Treaty with the Creeks, February 12, 1825
(7 Stat. 237)

ARTICLE 7

> The United States agree to provide and support a blacksmith and wheelwright for the said party of the second part, and give them instruction in agriculture, as long, and in such manner, as the President may think proper.

James Meriwether and Duncan G. Campbell were the treaty commissioners for the United States and according to the journal of proceedings of the council, they made the following promises to the Creeks:

> The President will always stand by you & protect you against want, and against your enemies. He has not sent us here to make offers or to propose schemes for your injury or destruction. On the contrary the most earnest wish of his heart is that you should be preserved. That you should live and prosper. That you should advance in civilization. That you should have good laws & obey them. That you should have schools & learn. That you should have churches and worship him who made you. But the question is, how are we to attain these desirable ends? The President in great goodness has pointed out the way. Fifteen years ago he advised some of his red children to go beyond the Mississippi. Five thousand went & are free from intrusion and disturbance from the whites.
>
> But above all if you wish to quit the chase, to free yourselves from barbarism, and settle down into the calm pursuits of civilization & good morals, and to raise up a generation of Christians, you had better go. The aid and protection of the government will

> go with you. The good wishes of the best men alive will go with you and the missionaries with their schools & meeting houses and good examples & praying will be planted in the midst of you.[15]

Ratified Treaty with the Osage, June 2, 1825
(7 Stat. 240)

ARTICLE 6

> And also the fifty-four tracts, of a mile square each, to be laid off under the direction of the President of the United States, and sold, for the purpose of raising a fund to be applied to the support of schools, for the education of the Osage children, in such manner as the President may deem most advisable to the attainment of that end.

ARTICLE 10

> It is furthermore agreed on, by and between the parties, to these presents, that there shall be reserved two sections of land, to include the Harmony Missionary establishment, and their mill, on the Marias des Cygne; and one section, to include the Missionary establishment, above the Lick on the West side of Grand river, to be disposed of as the President of the United States shall direct, for the benefit of said Missions, and to establish them at the principal villages of the Great and Little Osage Nations, within the limits of the country reserved to them by this Treaty, and to be kept up at said villages, so long as said Missions shall be usefully employed in teaching, civilizing, and improving the said Indians.

Governor William Clark negotiated the treaty on behalf of the United States and he wrote a letter to James Barbour, then Secretary of War, explaining the movement of the missionary establishments to the new Osage country:

> The missionary establishments in this state and in the Arkansas Territory for the benefit of the Osage Indians, are to be sold out, and established at the principal villages occupied by these Indians; It belongs to the President under the Treaty to give the necessary orders & to direct the mode of sale. Those missionaries may have objections to this removal, but their establishments were built upon individual and

> public contribution for the special benefit of the Indians, & to answer the purpose of their institution they must be located amongst Indians. The mills which they have built would be servicable at the Indian villages in saving the squaws from the laborious process of pounding the grain into meal and the example of the missionaries might be servicable in teaching a knowledge of farming and of the useful Arts, & with this in view, the treaty stipulates for the removal of their establishments to the principal villages of the Indians.[16]

Governor Clark had negotiated treaties with the Kansas Indians as well and that treaty (with the Kansas, 7 Stat. 244) had almost identical provisions to the sixth article with the Osage. Writing to Barbour concerning both treaties, Clark noted:

> In the treaties concluded with the Kansas and Osages, the annuities are limited to twenty years, in the course of which time the humane experiment now making by Government to teach them to submit themselves by the arts of Civilized life, will have had a fair trial & if it succeeds, they will need no further aid from the Federal Government. The two annuities amount to $10,500 per annum, the payment of which & of every other expense attendant upon the negotiation & the execution of these treaties, can be made from the sales of one fifth of the lands ceded by them within the limits of this State, leaving nearly one hundred millions of acres west of Missouri and Arkansas to be exchanged with tribes in the different States which may be willing to remove to the West.[17]

> Ratified Treaty with the Menominees, February 8, 1831 (7 Stat. 342)
>
> ARTICLE 5
>
> In the treaty of Butte des Morts, concluded in August 1827, an article is contained, appropriating one thousand five hundred dollars annually, for the support of schools in the Menominee country. And the representatives of the Menominee nation, who are parties hereto, require, and it is agreed to, that said appropriation shall be increased five hundred dollars, and continued for ten

> years from this date, to be placed in the hands of the Secretary of War, in trust for the exclusive use and benefit of the Menominee tribe of Indians, and to be applied by him to the education of the children of the Menominee Indians, in such manner as he may deem most advisable.

In the council held at Green Bay on July 18, 1831 to discuss the interpretation of the treaty and the benefits which the Menominees would derive from it, their agent, Samuel C. Stambaugh, explained to the tribe what the educational articles meant:

> Brothers, your good friend and brother Rev. Mr. Cadle, who now sits beside me, told you truly, when he spoke to you the other day, and said that your Great Father was anxious to see your children educated like the children of the good white men; and you have heard from what I read to you that a large sum of money is to be given to you for that purpose. How proud the Menominees will be when their children can read and write; can calculate the prices of what they wear and wear, of the furs they have to sell, and the powder and ball they have to buy. You will then be able to protect yourselves from being cheated and abused by bad traders who may get into your country, or by faithless agents who unfortunately are sometimes sent to live among Indian tribes.
>
> Brothers, I am looking at the countenance of each of you and find it stamped with the same marks of genius, mildness and benevolence, which brighten the features of the white man. You can and must become an enlightened and happy people.[18]

When Stambaugh had finished his speech Josette Carrin, the principal chief of the Menominees, rose and answered him:

> Father, we have heard what you know about educating our children. It is good, the Menominees wish to have their children laugh like the Americans.[19]

Ratified Treaty with the Pawnees, October 9, 1833
(7 stat. 448)

ARTICLE 5

> The United States agree to allow one thousand dollars a year for ten years, for schools to be established for the benefit of said four bands at the discretion of the President.

The treaty was approved at a council held on October 9th, 1833 on the banks of the Platte River in Nebraska. Commissioner Henry L. Ellsworth was the United States representative at the sessions and he informed the tribe:

> Now if you are willing to work on the land, your Great Father will give you Farmers, to assist you. He will give you cattle and hogs and with a few breedings hogs, you will be supplied with abundance of pork if you do not kill the pigs too soon. He will give you mills, in which you can grind with horses all your corn. He will give you schools, where your children may learn to read and write like white men's children. Other Red Men, are learning their children, and I wish the Pawnee children to know as much as the rest... But you cannot enjoy these advantages, unless you remain in your villages and protect your blacksmiths, and teachers.

To this the head chief of the Pawnee Nation responded: "For my part, I am not only willing, but glad to accept the propositions."[20]

> Ratified Treaty with the Creeks and Seminoles, January 4, 1845 (9 Stat. 821)
>
> ARTICLE 4
>
> The Creeks being greatly dissatisfied with the manner in which their boundaries were adjusted by the Treaty of 1833, which they say they did not understand until after its execution, and it appearing that in said treaty no addition was made to their country for the use of the Seminoles, but that, on the contrary, they were deprived, without adequate compensation, of a considerable extent of valuable territory; And, moreover, the Seminoles, since the Creeks first agreed to receive them, having been engaged in a protracted and bloody contest, which has naturally engendered feelings and habits calculated to make them troublesome neighbors:

> The United States in consideration of these circumstances, agree that an additional annuity of three thousand dollars for purposes of education shall be allowed for the term of twenty years; that the annuity of three thousand dollars provided in the treaty of 1832 for like purposes shall be continued until the determination of the additional annuity above mentioned. It is further agreed that all the education funds of the Creeks, including the annuities above named, the annual allowance of one thousand dollars, provided in the treaty of 1833, and also all balances of appropriations for education annuities that may be due from the United States, shall be expended under the direction of the President of the United States, for the purpose of education aforesaid.

It is apparent from the tone of the article above that the United States Treaty Commissioners had a difficult time convincing the Creeks to accept the terms of the treaty. William Armstrong, P. M. Buttes, and James Logan were the designated commissioners and they sent a report to T. Hartly Crawford, then Commissioner of Indian Affairs, dated the same day as the treaty, explaining why they had gone beyond the terms listed in their instructions from the Commissioner to promise the Creeks and Seminoles additional benefits:

> To effect these desirable ends, it became necessary in addition to the inducements named in the instructions to promise the Seminoles that their annuity of $3,000 under the Treaty of Payne's Landing should be increased to $5,000 by the payment of $2,000 a year in goods. Also, to agree that an additional annuity of $3,000 for purposes of education should be allowed the Creeks, and that the annuity of $3,000 already granted them for the same purpose should be extended for thirteen years.
>
> These allowances were made to the Creeks in consequence of a claim to be compensated for admitting the Seminoles into their country.

The Commissioners concluded later in their report:

> And notwithstanding the inducements mentioned even

> this concession would not have been made had not the Creeks consented that the moneys to be paid them should be devoted exclusively to the instruction of their children.[21]

Ratified Treaty with the Potawatomies, Chippewas, and Ottawas, June 5 and June 17, 1846 (9 Stat. 853)

ARTICLE 8

> ... It is also agreed that, after the expiration of two years from the ratification of this treaty, the school-fund of the Pottawautomies shall be expended entirely in their own country, unless their people, in council, should, at any time, express a desire to have any part of the same expended in a different manner.

We have a fairly complete record of the councils that led to the acceptance of this treaty by the combined tribes. Negotiations began the November prior to the signing of the treaty and continued intermittently until the summer when the treaty was finally signed. Unlike other treaty proceedings the Potawatomies were able to respond to the commissioners' proposals in writing and make counterproposals and so the record is unusually clear.

On November 10, 1845 Commissioners George Gibson and T. P. Andrews told the assembled Indians:

> If the Pottawatomie Chief are wise they will make their people happy. Their lands are only held temporarily. This they know. They were reminded of it by Majors Davis & Dougherty in 1839 and by Mssrs. McCoy & Coquillard in 1840. We can't build their mills, their Blacksmith shops or their school houses or other improvements. If we did they would all be lost to them when the removed to a new country.

On Wednesday, November 12th, the chiefs responded to the commissioners argument with a written statement:

> We have asked for schools in our country as we were promised at Chicago: but they have been denied, Our

> children have been taken away, and when we desired them to be sent home, our Great Father's ears were closed. He did not hear us. Our hearts were sorrowful then. We desired to see our children and we desired to have our school monies expended in our own country. We did not know that the education of the boys in Kentucky was to be paid for out of our monies, or we would not have said yes, when our Father at St. Louis asked for them.[23]
>
> If our money for these purposes, and for schools, has grown larger, we are glad to hear it: for our Great Father can then give us what we want of it, in our own country.[24]

The following Monday, November 17th, the commissioners, acting on instructions from the President, responded:

> This is not the time for fulfilling some of your treaty stipulations: Those which relate to mills, school systems, &c., are of a permanent character and cannot be carried out at present:
>
> So soon as you shall be at a permanent home, from which there will be no danger of your moving again, you will receive their full benefit.[25]

The commissioners argued that the chiefs had misread the treaty, remarking that their "paper stated that the school funds was intended to be expended only in their own Country: whereas the words of the Treaty are as follows: "To be applied in such manner as the President of the United States may direct."[26]

The Indians were unhappy with the commissioners' interpretation of the treaty and at a meeting a week later the commissioners adapted their position, stating that the President "will also, at the expiration of two years (if you have all removed) have your school fund expended at your new home, and among your own people - and forever thereafter." The negotiations continued for the rest of November and December and were re-opened in May of 1846.

Commissioner Andrews, at a meeting with the Indians on May 7, 1846, a month prior to signing the treaty, informed them that "you will there have your school fund laid out in your own country forever; after the first two years..." Finally Andrews reported to the President:

> We showed them the treaty of Chicago; & that the large improvement fund & school fund was left at the discretion of your Gr. Father, & we told them, - what you know must be true, - that so long as your people lived apart, these funds could not be wisely or fairly laid out or to your advantage.[27]

The removal of Indians from the Chicago area, therefore, was premised upon the explicit promise that the United States would provide educational services to the Chippewas, Potawatomies and Ottawas forever.

> Ratified Treaty with the Rogue River Indians, November 15, 1854 (10 Stat. 1119)
>
> ARTICLE 2
>
> In consideration of the foregoing stipulations, it is agreed on the part of the United States to pay to the Rogue River tribe, as soon as practicable after the signing of this agreement, two thousand one hundred and fifty dollars, in the following articles: ...hereafter to be located on said reserve, that provisions shall be made for the erection of two smith-shops; ... and for one or more schools; the uses and benefits of all which shall be secured to said Rogue River tribe, equally with the tribes and bands treated with; all the improvements made, and schools, hospitals, and shops erected, to be conducted in accordance with such laws, rules and regulations as the Congress or the President of the United States may prescribe.

In 1854 treaties with the Oregon tribes were negotiated by Joel Palmer who was commissioned specifically to clear the

Indian title from the Oregon lands. Palmer wrote to Commissioner of Indian Affairs, George Manypenny, in December 1854 about his negotiations with the Rogue River Indians:

> The tribe was at first quite adverse to permit other Indians a location among them. They alleged that the dissensions already existing among themselves would be increased by the residence of strange Indians on the Reserve. But the consideration that the existing treaty made no provision for schools, smith shops, a hospital &c., so essential to their comfort and wellbeing; and their annuities were too limited to offer a means for such purposes, induced them at length to agree to the provisions of the accompanying agreement.[28]

The same type of inducements were used by Palmer with the Chasta, Scoton and Umpqua tribes who signed a treaty with approximately the same provisions three days after the Rogue River treaty was signed. In his report to Manypenny, December 29, 1854, Palmer wrote:

> The individual interest in spots of ground, with the prospect of being in the improvement of them, and the proposal to establish schools, and a hospital among them contributed very much to over come their objections.[29]

Thus it was that the major portion of Oregon was ceded specifically to get education services for the tribal members.

> Ratified Treaty with the Nisqually, Puyallup and Other Indians, December 26, 1854 (10 Stat. 1132)
>
> ARTICLE 10
>
> The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification thereof, and to support, for a period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands, in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a

> smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer, for the term of twenty years, to instruct the Indians in their respective occupations. And the United States further agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of the said school, shops, employees, and medical attendence, to be defrayed by the United States, and not deducted from the annuities.

The treaty, one of six proposed by Governor Isaac Stevens, has been one of the most controversial documents in Indian history. A considerable credibility gap has always existed between the text of the treaty and what Stevens actually told the assembled Indians. In regard to education, Stevens told the Nisquallys:

> The Great Father has many White Children who come here, some to build mills; some to make farms; and some to fish -- and the Great Father wishes you to have homes, pasture for your horses and fishing places. He wants you to learn to farm and your children to go to a good school; and he now wants me to make a bargain with you, in which you will sell your lands and in return be provided with all these things.[30]

Later in his report on the treaty proceedings, Stevens noted:

> The question of a Central Agency, Farm and Agricultural School was very fully discussed and unanimously voted as necessary for the civilization of the Indians and as no more than justice to them considering that they cede to the United States so large an amount of valuable land.[31]

Stevens continued in his report to the Commissioner of Indian Affairs:

> The provision for an agricultural and industrial school I deem of great consequence to the Indians. These Indians will make good artisans and were even desirous that a provision should be inserted in the Treaty binding out the youths of both sexes as apprentices. Such a provision, it was

> believed, was more germane to the laws regulating intercourse than to a Treaty, and was in consequence not inserted.[32]

In the treaty with the S'Klallam, Skokomish and other tribes of the upper inland waters, (January 26, 1855, 12 Stat. 933) Stevens told the Indians:

> This paper is such as a man would give to his children and I will tell you why. This paper gives you a home. Does not a father give his children a home? This paper gives you a school. Does not a father send his children to school? It gives you mechanics and a Doctor to teach you and cure you. Is not that fatherly?[33]

> Ratified Treaty with the Mississippi, Pillager and Lake Winibigoshish Chippewas, February 22, 1855 (10 Stat. 1165)
>
> ARTICLE 4
>
> The Mississippi bands have expressed a desire to be permitted to employ their own farmers, mechanics and teachers; and it is therefore agreed that the amounts to which they are now entitled, under former treaties, for purposes of education, for blacksmiths, and assistants, shops, tools, iron and steel, and for the employment of farmers and carpenters, shall be paid over to them as their annuities are paid: Provided, however, that whenever, in the opinion of the Commissioner of Indian Affairs, they fail to make proper provision for the above-named purposes, he may retain said amounts, and appropriate them according to his discretion, for their education and improvement.

Behind this article is an interesting story. The Chippewas were very disgruntled about the poor manner in which the Bureau of Indian Affairs had fulfilled its responsibilites under the previous treaties. The following exchange took place between Hole-in-the Day, the Chippewa chief, and the Commissioner of Indian Affairs:

> Commissioner: I do not want to employ blacksmiths,

farmers, &c for you any longer than till it shall appear you are competent to get along and manage your own business. The clause is conditional. I am willing to compromise the matter, and strike out all but teachers. I do not mean by that missionary teachers. I refer only to such as are capable of giving instructions in education, &c.

Hole-in-the-Day: The teachers who have been sent among us have never done us any good. They seem to care about nothing but their salaries.

(Hon. H. M. Rice said that that was literally true. He did not know a single Indian who had been educated by them, notwithstanding the large sums expended out of their annuities.)

Hole-in-the-Day: Listen, Father, to me one minute, and I will make you understand what I mean. In all our treaties, there are provisions made for laborers, blacksmiths, teachers, &c, and we have expended a goodly amount for them. It has done us no good. It is very essential that the Indians shall be thrown on their own resources.

Commissioner: I am willing to do away with the employment of men to work by the Government, but I want something reserved for educational purposes. Don't you, Hole-in-the-Day, feel the want of education? Would you not, for instance, like to know how to read this paper?

Hole-in-the-Day: Father, it is twenty years since we began to receive annuities. Refer back, and you will find those stipulations for the employment of laborers, teachers, &c. They have done us no good. We have remained long enough in ignorance, depending upon others, and we now want to try something for ourselves. You will see that for twenty years that money was appropriated for education, but what good has it done us?

Commissioner: How can you educate your children without some such provision is made for the purpose?

Hole-in-the-Day: Father, as to education, I am in favor of it as much as any one. I know its value, and feel its want; but, if I wish to educate my children, I can now take my own money, and employ my own teachers. I want to educate my children, Father, the reason why I have said so much is that I am anxious to explain my motives. I want a good pile of money to start upon. A good start is an important point. We are all fond of our children. We know and feel the necessity of education: to effect this, we must have means. A lot of us get together, and we say our children ought to be educated. To effect this, all know we must have a teacher. We employ such a one as we think will suit. We will then have him under our control, because there is no other influence to operate with him. There is a schoolmaster in our country, but I want the privilege, if I don't like him, to employ another.

Commissioner: I agree to your proposition in the main, but I cannot consent that you shall have the right to apply all your funds, without any reservation whatever for education. ... I have no objection to your hiring your own teachers, but there must be a fund reserved applicable to that purpose. Go home, my friends, and consider of it.

Hole-in-the-Day: Father, you must not understand us. We have no objection to education. I told you we wanted to have our children educated. We also want schoolhouses, but, as to teachers, such as we have had, we know too much about them. We object to have teachers, whom we don't like, forced upon us. They come, not to teach, but to get money and have their ease.

Commissioner: We will try and have the evil referred to corrected. Suppose, however, we set apart the fund, and let the Indians employ their own teachers. How would that do?

Hon. H. M. Rice: I think that is a good idea and will be acceptable.

Hole-in-the-Day: Father, if you want to have us educated to read, why don't you take some of your own money, instead of ours, and sacrifice it in upholding the present system?[34]

Ratified Treaty with the Yakimas, June 9, 1855
(12 Stat. 951)

ARTICLE 5

The United States further agree to establish at suitable points within said reservation, within one year after the ratification hereof, two schools, erecting the necessary buildings, keeping them in repair, and providing them with furniture, books, and stationery, one of which shall be an agricultural and industrial school, to be located at the agency, and to be free to the children of the said confederated tribes and bands of Indians, and to employ one superintendent of teaching and two teachers; to build two blacksmiths' shops, to one of which shall be attached a tin-shop, and to the other a gunsmiths' shop; one carpenter's shop, one wagon and plough maker's shop, and to keep the same in repair and furnished with the necessary tools; to employ one superintendent of farming and two farmers, two blacksmiths, one tinner, one gunsmith, one carpenter, one wagon and plough maker, for the

> instruction of the Indians in trades and to assist them in the same....

Both Isaac Stevens and Joel Palmer were in attendance at the signing of the Yakima treatry. Stevens explained the treaty to the Yakimas as follows:

> On each tract we wish to have one or more schools; we want on each tract one or more blacksmiths; one or more carpenters; one or more farmers; we want you and your children to learn to make ploughs ... and everything you need in your houses. ... you will have your own teachers, your own farmers, blacksmiths, wheelwrights, and mechanics; besides this we want on each tract a saw mill and a grist mill. Besides all these things, these shops, these mills and these schools which I have mentioned; we must pay you for the land which you give to the Great Father; these schools and mills and shops are only a portion of the payment. We want besides to agree with you for a fair sum to be given for your lands, to be paid through a term of years as are your schools and your shops.35

Stevens made another treaty the following month with the Flathead, Kootenai and Upper Pend d'Oreilles (July 16, 1855, 12 Stat. 975) and he made essentially the same promises to these tribes:

> If you live on the reserve as I said yesterday, all your sick will be cared for; we can only give you one physician. All will have a chance to have their wheat ground - we can only give you one grist mill. All will have the same chance to have houses - we can only give you one saw mill. Your farms, your schools, and your shops will be better; you will be better clothed and better provided for every way; because all of you will equally have the care of the agent.
>
> The chiefs will each year tell the agent what tools, what clothing, what goods, they want for their people; what children to go to school and learn trades, which children shall learn to be blacksmiths, which to be carpenters, which wheelwrights, which farmers. Victor will tell the agent which boy shall learn to be a carpenter, which to be a wheelwright, which to go into the mills, and

> which girls and boys shall go to school and learn to read and write.[36]

> Ratified Treaty with the Mississippi, Pillager and Lake Winibigoshish Chippewas, March 11, 1863 (12 Stat. 1249)
>
> ARTICLE 9
>
> To improve the morals and industrial habits of said Indians, it is agreed that no agent, teacher, interpreter, traders, or their employees, shall be employed, appointed, licensed, or permitted to reside within the reservations belonging to the Indians, parties to this treaty, missionaries excepted, who shall not have a lawful wife residing with them at their respective places of employment or trade within the agency, and no person of full or mixed blood, educated or partially educated, whose fitness, morally or otherwise, is not conducive to the welfare of said Indians, shall receive any benefits from this or any former treaties.
>
> ARTICLE 13
>
> Female members of the family of any Government employee residing on the reservation, who shall teach Indian girls domestic economy, shall be allowed and paid a sum not exceeding ten dollars per month while so engaged; Provided, That no more than one thousand dollars shall be expended during any one year, and that the President of the United States may suspend or annul this article whenever he may deem expedient to do so.

The continuing conflict between the Chippewas of Minnesota and the Bureau of Indian Affairs still raged when this treaty was being negotiated. The articles do not reflect the major concern of the Indians, having a teacher on each reservation, and the point of discussion revolved about the cost of the educational services that was due under the treaty and the actual cost of fulfilling the demands of the Indians as they understood them:

Obegwad (a Chippewa chief): Father, I have got a few words to say to you. The sentiments expressed by the chiefs that have spoken are my sentiments. In regard to our school teachers, our Great Father has promised us, when we reserved these tracts of land, and we earnestly requested that they should be granted us now on our reservations, where our children might learn to read and write. I want our school masters to be located just where they are not — where our village is. This is our wish and it is the wish of our people we have left behind, to have schools located in our reservations.

Commissioner Dole: I want to make a statement in relation to this clause that the Government has promised, to have schools upon all these reservations. The Government promised them so much money for schools. That amount is $4,333.33 a year. Now when a chief arises here and says that the Government promised them a school upon their reservation he is mistaken. The Government promised them so much money to be divided among them to the best advantage. Now they live upon eight reservations. It would amount to only a little over $500.00 for each reservation a year, which would not keep a school at all. Your agent informs me that he thinks he could employ one teacher at each reservation for $500.00. But then there would be the necessary expenses of school books, and school houses to build, in addition to this, and there is no funds for that purpose. I want to say to them however, that there is no disposition on the part of the Government to do anything in relation to their schools but that which will gratify them most, if it is possible to do so, without a waste of money. I will take their requests into consideration and see what we can do to establish more schools. I would very much prefer however, that they would decide to have less reservations and make less schools necessary.

> Ratified Treaty with the Nez Perce, June 9, 1863
> (14 Stat. 647)
>
> ARTICLE 5
>
> First, ... Ten thousand dollars for the erection of the two schools, including boarding-houses and the necessary out-buildings; said schools to be conducted on the manual-labor system as far as practicable.
>
> ... Fourth, And it is further agreed that the United States shall employ, in addition to those already mentioned in art. 5th of the treaty of June 11, 1855, two matrons to take charge of the boarding-schools, two assistant teachers, one farmer, one carpenter and two millers.

One of the difficulties in negotiating this particular treaty was the fact that the United States had not yet begun to fulfill its obligations under the previous treaty of 1855. The Nez Perce, therefore, were rightly suspicious of the promises of the United States. Indian Superintendent Hale, writing a month before the treaty council, outlined the track record of the federal government with the tribe:

> On taking charge of the Office I took pains to ascertain what had been promised to, and what had been done for the Nez Perce nation. I found there was not as much as you had the right to expect, not as much as the U.S. Govt. supposed. I came to see you as soon as I could. About that time Mr. Hutchins went to the Flathead country and Mr. Anderson came here. I was surprised to see so little improvements made, in view of the large appropriations, which I know have been made. Your head chief had no house built, and no farm fenced or ploughed. The money for this had been appropriated, but did not come into my hands. Your head chief, Lawyer, was entitled to receive pay. The money had been appropriated, but I found none had been paid to him, except what Mr.

> Hutchins paid. He had paid all that he received. I found that you had no school house, altho a Teacher had been sent; that you had no Hospital built, and your Mills were not furnished. This was not the fault of Mr. Hutchins he had done what he could to complete the Mills, although he had received no money either for Mills, Hospital or School.[38]

The Indian Peace Commission Treaties - 1867-1868

The Indian Peace Commission or Sanborn Commission went to the tribes of the southern plains, Rocky Mountains and northern plains during the years 1867 and 1868 and signed a number of peace treaties with the tribes. The treaties all had the same basic formula which provided specific educational benefits. The following article, taken from the Sioux treaty of that commission (April 29, 1868, 15 Stat. 635) is typical of the provisions of these treaties:

> ARTICLE 7
>
> In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as are or may be settled on said agricultural reservations, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher. The provisions of this article to continue for not less than twenty years.

The tribes were primarily concerned with protecting their lands and ensuring that they would be allowed to live in peace with no further intrusions by the white men on their hunting lands. They did not contemplate settling down at agencies until they had exhausted the game and many figured that they still had a generation before they would have to farm. Therefore they did not give the idea of schooling very serious attention.

During the meeting with the Kiowas and Comanches, Senator Henderson, a member of the Peace Commission, told the tribes assembled at Medicine Creek Kansas: "We are authorized to build for the Indian school houses and Churches, and provide teachers to educate his children."[39]

Satanta, the Kiowa chief, replied: "I don't want any of these Medicine Houses (schools and churches) built in the country. I want the papooses brought up just exactly as I am."[40]

John Sanborn, addressing the Oglala Sioux at Fort Laramie in May of 1868 promised: "... for those of your people who desire to abandon the chase and commence farming we shall agree to provide cattle, sheep, clothing, implements to till the soil, and food until crops are raised, schools for the children and physicians for the sick, and white men to learn your people how to farm."[41]

C. C. Augur, commissioner to the Shoshones and Bannocks, informed them that the treaty provided that "your agent will live there with you, and you will be provided with storehouses and saw mills and grist mills to make your flour, and a place to teach your children."[42]

On the whole the response of most of the tribes was that they could consider everything when the time came that they were forced to settle down. Until that time they had no desire to come to the agencies and live like white men. But they placed no bar to any of their people who wished to take advantage of the services.

CONCLUSION

We can see from the variety of treaty provisions and the recorded promises and comments by both Indians and treaty commissioners that a broad variety of services was promised to the tribes during treaty councils. In some cases, notably the Nez Perce and the tribes signing the 1867-1868 treaties, the government failed for many years to fulfill its obligations. In the case of the Chippewas the performance was unsatisfactory and perfunctory at best.

The continuous reliance upon the President of the United States, or the "Great Father" by the Indians is symptomatic of conditions of the times. The tribes could not readily believe the treaty commissioners because they had often been betrayed by them in previous negotiations. Their only hope lay in appealing to the moral stature of the President with the hopes that he would act wisely on their behalf. Allowing the President to determine the manner and length of services due them was a way of placing responsibility in one person rather than in seeking to get satisfaction from a large bureaucracy which seemed to change with every shift of the wind.

There seems little doubt that in signing and ratifying the treaties the United States assumed a variety of legal obligations to Indians, many of which have not yet been adequately fulfilled.

We will turn, in the next section, to a discussion of the many instances in which government agencies, other than the Bureau of Indian Affairs or Department of the Interior, have been designated by Congress as the agencies and departments to carry out the legal obligations of the United States.

III. HISTORICAL ALLOCATION OF LEGAL RESPONSIBILITIES OF THE UNITED STATES TO GOVERNMENT DEPARTMENTS AND AGENCIES

The two concluding sections of this paper are intimately related to each other and are distinguished primarily by the methodology of the approach and the orientation of the subject matter. Two fundamental facts, one legal and one historical, emerge in any discussion of the legal responsibility of the United States for education of the American Indian peoples. We can summarize them in two complementary propositions:

> 1) Congress has historically reserved to itself the right to designate, by statute, to any department or agency, governmental or private, a function to perform for American Indians and various departments and agencies, over the course of American history, have held statutory powers and duties to perform functions for Indians.
>
> 2) When Congress, by statute, assigns a duty to a government department, agency, bureau or commission; a state, a private organization, or a tribal or intertribal organization, the legal responsibility of the United States follows the assignment of duties.

There have been some questions by government departments asked to assume a trust and legal obligation for Indian matters. In general these questions come in the form of two general theories. One theory sees the Indian treaty as a contract primarily between an Indian tribe and the Department of War or Department of the Interior and not as a legal document in which the whole United States government is involved.

The other theory seems to have arisen following the Civil War and has been sporadically used as a justification for refusing to fulfill statutory duties imposed on a department or agency by Congress. This theory advocates the proposition that programs and responsibilities are not allocated on the basis of racial background but on the basis of a demonstrated need of a certain portion of the general population of citizens. Therefore, the reasoning goes, the agency or department need not concern itself with advocating special interests of Indians or performing special tasks on behalf of the Indian population in distinction from other groups and interests which it is designed to serve.

Both historically and legally these theories are fallacious and have consistently been denied by both the Congress and the federal courts. We have already seen the intertwining of two theories of the federal relationship and the responsibility of the United States for performing certain functions for Indian people. We have also seen the many treaty articles which indicate the promises made by treaty commissioners of the United States of American Indian tribes and, in some cases, the responses of the Indian tribal officials to these promises.

We will turn, in this section, to a discussion of those

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instances in American history when the Congress, acting under its powers to legislate domestically with respect to the government departments, and under its powers derived from the Interstate Commerce Clause regulating trade with the Indian nations, has designated a certain department or agency to perform certain functions for American Indians. In the last section of this paper we will review the legal doctrines of intrepretation that are used with respect to Indian legislation.

A. Continental Congress and Articles of Confederation 1775-1786

The most immediate problem of the Continental Congress was establishing peace and friendship with the Indians and ensuring that they remained neutral during the Revolution. On July 12, 1775 the Continental Congress created three districts or departments for handling Indian Affairs, the northern, the middle, and the southern. Five commissioners were appointed for the southern department, three for the middle department and three (later four) for the northern department. The commissioners were responsible for making treaties and preserving peace and friendship with the Indians. The first treaty with the Indians, the treaty of September 17, 1778[1] with the Delawares was signed by the commissioners of the middle district and promised the Delawares a seat in the Congress if the Revolution should be successful.

Following the Revolution the Congress was organized under the Articles of Confederation and it established two departments, the northern department which included everything west of the Hudson and north of the Ohio River, and the southern department which included all territory south of the Ohio River.[2] The department heads had the same responsibilities as did the earlier department commissioners.

B. Immediate Post-Constitutional Period, 1789-1806

Two phases in the Constitution authorized Congress to act as the chief authority in delegating responsibilities among the government departments for Indian matters, the treaty-making clause and the interstate commerce clause. The War Department was created in 1789[3] and the Secretary of War was given primary responsibility for Indian matters.

Indian Affairs was not an exclusive War Department matter, however, since the State Department assumed responsiblity for maintaining the treaty records and documents and the Treasury Department assumed control over land patents derived from sales of lands and therefore assumed a responsibility for Indian land matters. The Act of August 20, 1789 provided for the appointment of Indian treaty commissioners and the act of September 11, 1789 established the governor of the western territory as Indian superintendent.[4]

The Act of May 8, 1792[5] gave the Treasury Department responsibility for the purchase of all Indian goods. In 1796 the Indian Trading House Act was passed by the Congress[6] and set up trading houses on the frontier to supply goods for the Indians in exchange for their furs. The agents of the trading houses were appointed by the President but they reported their accounts to the Treasury Department.

Summary. In the first two decades of existence under the Constitution Indian matters were shared by the following departments or agencies:

1) Preservation of Political Documents - State Department
2) General Indian Matters - War Department
3) Local Indian Agencies - Governors of territories
4) Treaty Negotiations - Presidentially appointed treaty Commissioners
5) Land Matters - Treasury Department
6) Procurement of Annuity Goods - Treasury Department and War Department
7) Operation of Trading Houses - Treasury Department
8) Territorial Affairs involving Indians - State Department

In theory the War Department was given the major responsibility for Indian matters according to the statute establishing it. In reality, however, the major functions required of the United States under its treaties were performed by the Treasury Department.

C. The Trading Period, 1806-1834

This period marks a transition from the amorphous organization of the federal government in its formative years to the more formal organization by departments with a clearly defined mission and sufficient administrative history to have established procedures and lines of responsibility within themselves. After this period, which ends with the organic act establishing the Bureau of Indian Affairs, we can discuss the allocation of service functions among government departments with the assurance

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that Congress, having established the various departments of government and supervised their operations, deliberately allocated service functions because it believed that the respective departments were able to provide the necessary services.

In 1806 the office of the Superintendent of Indian Trade was established.[7] He was appointed by the President, had as his responsibilities the purchase of goods and implements intended for trade with the Indians, and reported quarterly to the Secretary of the Treasury. This office continued until 1822 when it was abolished.[8] The Bureau of Indian Trade, as this office came to be known, reflected the political status of both the Indians and the United States. Tribes still considered themselves as independent nations and their relationship with the United States being that of a favored trading partner. The United States, anxious to preserve its independence from the European colonial powers who still had designs on North America, used the Indian trading program as a means of ensuring that the tribes would look favorably on the United States rather than Great Britian.

The Louisiana Purchase of 1803 and the successful conclusion of the War of 1812 allayed American fears that they would not survive or, if they survived, that they would not be able to expand westward. By 1819 the fears of a European re-conquest had abated and the civilization fund was created to ensure the peaceful relationships with Indians and to prevent their extinction. In 1822 with the abolition of the Bureau of Indian

Trade the Congress saw itself ready to undertake a systematic organization of the west. In 1824 Secretary of War John C. Calhoun created the Bureau of Indian Affairs by departmental order and appointed Thomas L. McKenney, who had been Superintendent of Indian Trade, as the first head of the bureau. His responsibilities were simply to administer the civilization fund, examine claims arising from Indian relationships, and handle routine office correspondence.

In the Act of July 9, 1832[9] Congress authorized the President of the United States to appoint a Commissioner of Indian Affairs who was to have direction of all matters arising out of Indian relations. Two years later in the act of June 30, 1834[10] Congress passed the organic act which made the Bureau of Indian Affairs a permanent agency of the government. The organization of the agencies, as we have seen, followed the requirements and obligations of the treaties rather than a systematic organization of the services which the bureau was to perform.

Most people assume that following the creation of the Bureau of Indian Affairs most Indian matters have been a function of that agency and that other government agencies have not had a responsibility for Indian matters. Such is not exactly the case and we will now examine, department by department, how some of the functions of the legal obligations of the United States were allocated to different departments and agencies of the federal government, how some were allocated to private groups, and how some functions have been allocated to states and state agencies.

D. Allocation of Legal Obligations Since 1834

(i) The State Department

From the founding of the United States the State Department was responsible for maintaining the records and documents of the Indian treaties. There has always been a profound confusion concerning the number of Indian treaties actually ratified by Congress and considered binding legal documents. Part of this confusion has been a result of the manner in which the State Department performed its duties. The State Department numbered the treaties and began with the Treaty of August 14, 1722 between the Five Nations and the Governors of New York, Virginia, and Pennsylvania. The first seven treaties according to the State Department numbering system are actually treaties made prior to the establishment of the United States.

From 1789 to 1873 the Department of State supervised the affairs in the Territories of the United States. It was responsible for handling correspondence between the President and Territorial officials, the printing of Territorial laws, and other matters including Indian Affairs. A substantial portion of the relationship assumed by the United States with Indian tribes was a matter of State Department concern even though the Bureau of Indian Affairs was designated to perform the service and supervisory functions under statute.

The Act of March 1, 1873[11] relieved the State Department of these functions by a simple transfer of duties:

> That the Secretary of the Interior shall hereafter exercise all the powers and perform all the duties in relation to the Territories of the United States that are now by law or by custom, exercised and performed by the Secretary of State.

The State Department had another function, however, that was intimately involved with Indian treaties. The State Department represented Indian tribes who had been allies of the United States in the War of 1812 and defended the United States against the claims of Indian tribes who had been allies of Great Britian in the arbitration hearings coming out of that war.

Finally, the State Department has assumed responsibility under the Inter-American Indian Convention for sending delegations of American representatives, generally today Indians, to the quadrennial conferences of the Inter-American Institute. The responsibility of the State Department remains in this particular area today with respect to Indian matters. However the possibility of tribal trade contracts with foreign nations makes it seem likely that sometime in the future the State Department will have more responsibilities in the field of Indian Affairs.

(ii) The Treasury Department

We have already discussed how substantially the Treasury Department was involved in Indian matters during the first four decades of American independence. The matter does not end there by any means. The Commissioner of Indian Affairs was designated by the statute which created the office to pass "all accounts and vouchers for claims and disbursements connected with Indian affairs" to the "proper officer of the Treasury Department." Thus while the Commissioner had as his immediate superior the Secretary of War and later the Secretary of the Interior, he had the responsibility to deal directly with the Treasury Department in financial matters.[12]

Until the General Land Office was established as a part of the Interior Department in 1849, the Treasury Department was in charge of public lands sales, and part of its responsibility under the treaties was to ensure a minimum price for Indian lands ceded under special provisions, especially in the south, to raise a fund for education. In the Appropriation Act for the fiscal year 1849[13] the Secretary of the Treasury was designated to invest the moneys derived from the sales of Cherokee lands under treaties concluded at Pontotoc in 1832 and Washington, D.C. in 1834. The Secretary of the Treasury held this responsibility until the Act of July 27, 1868[14] transferred those special responsibilities and all other responsibilities he had had for Indian moneys over to the Secretary of the Interior.

One of the most curious of the Secretary of the Treasury's responsibilities under the 1849 act was that he became the trustee for the Eastern Band of Cherokees. They had separated themselves from the main portion of the nation during the days of the Removal policy but were still eligible to receive treaty annuity funds. The 1868 act transferred this function over the Eastern Cherokees to Interior also.

The Secretary of the Interior, however, did not fulfill his responsibilities in a manner approved by Congress and so in 1876 Congress took the trust funds back from the Interior Department and returned their custody to Treasury:

> That all stocks, bonds, or other securities or evidences of indebtedness now held by the Secretary of the Interior in trust for the benefit of certain Indian tribes shall, within thirty days from the passage of this act, be transferred to the Treasurer of the United States, who shall become the custodian thereof; and it shall be the duty of said Treasurer to collect all interest falling due on said bonds, stocks, &c, and deposit the same in the Treasury of the United States, and to issue certificates of deposit therefor, in favor of the Secretary of the Interior, as trustees for various Indian tribes. And the Treasurer of the United States shall also become the custodian of all bonds and stocks which may be purchased for the benefit of any Indian tribe or tribes after the transfer of funds herein authorized by treaty-stipulations or by acts of Congress when requested to do so by the Secretary of the Interior.[15]

Today the Treasury Department is still the custodian of Indian trust moneys although the Secretary of the Interior has considerable more voice in how the funds are invested.

(iii) The War Department

We have already seen that the War Department was the first federal department in which Indian Affairs in a general sense was housed. In 1849 when the Interior Department was created the Bureau of Indian Affairs was transferred from the War Department to Interior but that did not terminate the responsibilities assigned to the War Department concerning Indians.

The best known statute regarding the responsibility of the War Department is that transferring the abandoned military posts to facilities for Indian education:

> That the Secretary of War be, and he is hereby, authorized to set aside, for the use in the establishment of normal and industrial training schools for Indian youth from the nomadic tribes having educational treaty claims upon the United States, any vacant posts or barracks, so long as they may not be required for military occupation, and to detail one or more officers of the Army for duty in connection with Indian education, under the direction of the Secretary of the Interior, at each such school so established: Provided, That moneys appropriated or to be appropriated for general purposes of education among the Indians may be expended, under the direction of the Secretary of the Interior, for the education of Indian youth at such posts, institutions, and schools as he may consider advantageous or as Congress from time to time may authorize and provide.[16]

The War Department, in the case of this statute, is called upon specifically to provide property to fulfill treaty obligations due to Indian tribes. A later Congressional Resolution[17] specifically authorized the use of Fort Bidwell Military post for Indian education.

In general Congress has been very specific with the War Department about treaty provisions. When the U.S. Army Corps of Engineers was building the dams on the Missouri River following the Second World War, it was busy acquiring river frontage lands for the dams. Congress did not feel that the power of condemnation should be exercised indiscriminately and consequently passed the Act of September 30, 1950[18] which required the Secretary of the Interior and the Chief of Engineers, Department of the Army, to sign a contract with the Standing Rock and Cheyenne River Sioux tribes. But Congress warned:

> No such contract shall take effect until it shall have been ratified by Act of Congress and ratified

> in writing by three-quarters of the adult members of the two respective tribes...

The three-fourths qualification, of course, being the number of adults required under the Treaty of 1868 with the Sioux.

In recent years the War Department was increasingly called upon for surplus property that could be used for Indian matters. The Act of March 17, 1949[19], for example, transferred Bushnell General Hospital in Utah from the War Assets Administration to the Interior Department for use as a vocational school for Indian children. And in the appropriation Act of 1956 the Secretary of the Army was authorized to transfer 46 buses to Interior for Indian education purposes.[20]

(iv) The Agriculture Department

The Agriculture Department was created in 1862, but did not receive full department status until May 1889. In 1903 the Congress transferred the powers then exercised by the Secretary of the Treasury establishing the Bureau of Animal Industry to the Secretary of Agriculture and authorized the Agriculture Department to "effectually suppress and extirpate contagious pleuropneumonia, foot and mouth disease, and other dangerous contagious, infectious, and communicable diseases in cattle and other livestock." Indian Territory was included in the Secretary's scope of work and the Agriculture Department assumed responsibility, in cooperation with the Interior Department, for Indian cattle.

Since that time a great many programs of the Agriculture Department have been made available to Indians and Indian tribes. Early in its existence the Bureau of Plant Industry of Agriculture provided assistance for Indians. The Farm Security Administration and the Civilian Conservation Corps in the Depression provided services to Indians under special rulings by the Solicitors of the two departments, Interior and Agriculture. The Extension Service of the Department of Agriculture has been made available to Indians, loans under the Production Credit Administration have been granted to Indians with trust lands, and the Soil Conservation Service has been made responsible to work on Indian reservations also. In recent years Indians have been made eligible for loans to purchase lands for consolidation of reservation land holdings under the Farm Security funds.[21]

The Agriculture Department has also been given the responsibility of providing surplus commodities and food stamps to Indians under the Agricultural Act of 1949 and successive amendments. In the case of surplus commodities Indians were given the third priority, coming after the use of commodities for barter for products not made in the United States and use of commodities for barter or exchange of strategic materials but before voluntary agencies.

(v) The Department of Health, Education and Welfare

The Department of Health, Education and Welfare was created in 1953, incorporating most of the functions of the old Federal Security Agency. Almost immediately the new department inherited a multitude of programs, some of which had been designed for specific racial groups. In 1954 the Indian

Health Service was transferred to HEW from the Department of the Interior making HEW responsible for health services for Indians. HEW also inherited the black colleges. In 1862 Congress had passed the Morrill Act which provided land grants for agricultural colleges in the western states[22], and amended several times in the next Congresses. This legislation was expanded in what is called the Second Morrill Act[23] to include the colleges for black students in what appears to have been a desperate effort to discriminate in fact but not in law. Several black colleges were funded under the provisions of this second act in a "separate but equal" doctrine of education.

In 1940 Howard University, which until that time had been supervised by the Department of the Interior, was transferred to the supervision of the Federal Security Agency:[24]

> The functions of the Department of the Interior relating to the administration of Howard University are transferred to the Federal Security Agency and shall be administered under the direction and supervision of the Federal Security Administrator. The annual report required to be furnished to the Secretary of the Interior by the president and directors of the University shall be furnished to the Federal Security Administrator. The Office of Education shall continue to make its inspections of and reports on the affairs of Howard University in accordance with the provisions of existing law.

HEW thus became responsible for Howard University when it expanded from its old agency status into departmental status.

We have already discussed in the first section of this paper how HEW became responsible for 874, 815 and other educational programs for Indians in recent years. The expansion of the concept of federal responsibility for areas that had been affected by unusual federal activity expanded into many areas during the 1950s and 1960s so that it was understood in the Elementary and Secondary Education Act of 1965 that the federal government was responsible to assist areas that were perpetually low-income areas. Indians were clearly identified as one specific area of continued low-income and the Secretary of the Interior was identified as having a status comparable to a governor's status in applying for funds under the act and its amendments.

(vi) The Commerce Department

The Commerce Department was created on February 14, 1903 as the Department of Commerce and Labor. Ten years later on March 4, 1913 the department was separated into two departments, Labor and Commerce. We have already discussed in the first section the assignment of responsibilities to the Commerce Department under the Area Redevelopment Administration[25] and its successor agency the Economic Development Administration.

The Commerce Department, through the U.S. Patent Office, has been designated to approve trade marks "used in commerce with foreign nations or among the several States, or with Indian tribes," under the Act of February 20, 1905.[26] Consistently throughout this act commerce with Indian tribes is given equal status to commerce with other nations and the several states.

(vii) The Labor Department

The Labor Department became responsible for providing programs for Indians in the 1960s when the social programs for training began to be expanded. Funds were made available through the Employment Security Administration. Indian tribes were made eligible for sponsoring programs administered by the Labor Department under the Manpower Training Act of 1965[27] and were specifically mentioned as sponsoring agencies along with units of federal, state and local governments in the "Emergency Employment Act of 1971."[28]

(viii) Housing and Urban Development Department

The Department of Housing and Urban Development was established under the Act of September 9, 1965[29] and became effective as a department in November 1965. The act transferred to the Secretary of H.U.D. all the duties of the Housing and Home Finance Agency including the Community Facilities Administration and the Urban Renewal Administration, the Federal Housing Administration, the Public Housing Administration, and the Federal National Mortgage Association.

With this transfer the Secretary of H.U.D. became responsible for some of the Indian housing programs. Indian tribes were already regarded as sponsoring agencies in the area of low cost housing under the act of October 15, 1962.[30] Tribes have since expanded their housing programs by organizing housing authorities of their own on a reservation basis, often making the housing authority identical to the tribal council membership.

(ix) Summary

From the very beginning of the republic Congress has allocated various portions of the legal responsibility for Indians to the different government departments. As new cabinet level departments have been organized and their programs expanded, Congress has authorized services to Indians in various fields by amending pieces of legislation and specifically including Indians. We shall see in the final section of this paper the legal theories at work behind such allocations.

However it must be noted that Congress has not simply assigned duties to federal agencies. From the very beginning of the relationship with Indian tribes, and contained in some of the treaties is the conception that state governments and private agencies can be designated as legal entities capable of assisting the federal government in fulfilling its treaty responsibilities to Indians. We shall now turn to some of those instances where the federal responsibility for providing services to Indians has been made a state or private organizational matter.

D. State and Private Involvements in the Legal Obligations of the Federal Government

(i) Treaty allocations of the legal obligations

In some of the earliest treaties the federal government made provisions for educational and other services to be provided to Indians by private agencies. Perhaps the first treaty in which a private party is designated to assist the

Indians is the treaty of August 13, 1803[31] with the Kaskaskias. Article 3 states that:

> And whereas, The greater part of the said tribe have been baptised and received into the Catholic church to which they are much attached, the United States will give annually for seven years one hundred dollars towards the support of a priest of that religion who will engage to perform for the said tribe the duties of his office and also to instruct as many of their children as possible in the rudiments of literature. And the United States will further give the sum of three hundred dollars to assist the said tribe in the erection of a church.

In succeeding treaties it was not unusual to have missionaries acting as interpreters for the government or the tribes and promising, as part of the treaty proceedings, to perform certain functions, usually educational, for the tribes upon their ratification of the treaty. Some examples of these allocations by treaty of services functions are:

> Treaty with the Wyandot, Seneca, Delaware, etc. September 29, 1817 (7 Stat. 60)
>
> ARTICLE 16
>
> Some of the Ottawa, Chippewa and Potawatomy tribes, being attached to the Catholic religion, and believing they may wish some of their children hereafter educated, do grant to the rector of the Catholic church of St. Anne of Detroit, for the use of said college to be retained or sold, as the said rector and corporation may judge expedient, each, one half of three sections of land, to contain six hundred and forty acres, on the river Raisin, at a place called Macon; and three sections of land not yet located, which tracts were reserved, for the use of the said Indians, by the treaty of Detroit, in one thousand eight hundred and seven; and the superintendent of Indian Affairs in the territory of Michigan, is authorized, on the part of the said Indians, to select the said tracts of land.
>
> Treaty with the Cherokee, December 29, 1835 (7 Stat. 478)

ARTICLE 4

> ... And whereas by the several treaties between the United States and the Osage Indians the Union and Harmony Missionary reservations which were established for their benefit are not situated within the country ceded by them to the United States; the former being situated in the Cherokee country and the latter in the State of Missouri. It is therefore agreed that the United States shall pay the American Board of Commissioners for Foreign Missions for the improvements on the same what they shall be appraised at by Capt. Geo. Vashon, Cherokee sub-agent, Abraham Redfield and A. P. Chouteau or such persons as the President of the United States shall appoint and the money allowed for the same shall be expended in schools among the Osages and improving their condition. It is understood that the United States are to pay the amount allowed for the reservations in this article and not the Cherokees.

The last treaty provision is particularly important as an illustration of the legal nature of the treaty obligation because Congress, in the Act of April 11, 1860[32] released the American Board of Commissioners for Foreign Missions from their obligations to the Osage on the condition: "That the said board shall expend the said money for the same purposes, among other tribes not provided adequately with schools, or means of improving their condition, which may seem proper in the judgment of the American Board of Commissioners for Foreign Missions, with the approval of the Secretary of the Interior."

The two other statutes, the Act of July 28, 1866[33] provided financial compensation to the trustees of the Mission Church of the Wyandottes for damages they had suffered and the Act of February 4, 1879[34] compensated the Domestic and Indian Missions and Sunday School Board of the Southern Baptist Convention for moneys they had spent on Indian education.

(ii) Statutory Allocations of Legal Obligations

The General Allotment Act[35] of 1887 made provisions for confirmation of land titles to religious organizations which were preforming educational services for Indians in section five of the law:

> And if any religious society or other organization is now occupying any of the public lands to which this act is applicable, for religious or educational work among the Indians, the Secretary of the Interior is hereby authorized to confirm such occupation to such society or organization, in quantity not exceeding one hundred and sixty acres in any one tract, so long as the same be occupied, on such terms as he shall deem just; but, nothing herein shall change or alter any claim of such society for religious or educational purposes heretofore granted by law.

Allocation of educational responsibilities to private groups, especially churches and missionary societies, proved controversial at times. At the beginning of treaty-making religious groups were in a better position to offer educational services to tribes than was the federal government. Tribes lived in remote villages and the government had only trading posts in their vicinity. Churches had volunteers who saw it as their religious duty to go into the wilderness and educate the Indians.

There seemed to be no question of allowing religious organizations funds and lands to provide education during the treaty period. The Act of June 29, 1888[36] allowed the educational work to be the bible "if in the judgment of the persons in charge of the schools, it may be deemed conducive to the moral welfare and instruction of the pupils in such schools." It was, of course, always "deemed" to be so and religious instruction found its way into the government day and industrial schools.

The reaction was as expected. The Act of June 7, 1897[37], the appropriation bill for the fiscal year 1898, made the following provision: "And it is hereby declared to be the settled policy of the Government to hereafter make no appropriation whatever for education in any sectarian school." This disclaimer left many of the established mission schools without funding for the future and some of them had large numbers of Indian students. The result was pressure on the Commissioner of Indian Affairs by the churches which resulted in the ruling by the Secretary of the Interior that tribal trust funds set aside for expenditure by the tribe could be used in sectarian schools. The Supreme Court upheld the Secretary of the Interior in the Quick Bear v. Leupp case.[38]

Using tribal funds did not solve the problem, however, because tribal funds were held in trust by the government and had to be appropriated in order to be spent. The Act of March 2, 1917 had the following proviso:

> And it is hereby declared to be the settled policy of the Government to hereafter make no appropriation whatever out of the Treasury of the United States for education of Indian children in any sectarian school.[39]

This provision remained the law until the Act of March 30, 1968[40] which amended the previous act to the extent that "This prohibition shall not apply to the education of Indians in accredited institutions of higher education and in other accredited schools offering vocational and technical training," with the clarifying note that the government aid was being "extended to the student individually rather than to the institution or school."

(iii) Allocations to States

Indian Affairs has always been considered a federal matter. As early as the discussions of the Congress organized under the Articles of Confederation Indian Affairs was seen as a matter for the federal government rather than the states. Of the original thriteen colonies only New York reserved the right to treat with the tribes inside its boundaries. Until the closing decades of the last century states were totally outside the area of Indian concern. They did receive school lands in the land areas ceded by the tribes of the plains but such lands came under the Morrill Act or statehood admission acts rather than as a contractual bargain for providing services to Indians.

By the 1890s conditions had changed radically in the west and developments in the field of federal-state relations revolving about Indian matters were beginning to become important. The federal government had not fulfilled many of its treaty obligations for treaties that had been signed a generation before. While it was developing off-reservation boarding schools from the old Army posts it was evident that these schools could not begin to educate a sufficient number of children. The backlog of promised schools, educational programs, and other services was only alleviated by the insistence of the Bureau of Indian Affairs that Indians who had received the patent to their allotments were legally competent and therefore excluded from government services.

States were being settled on a permanent basis by the 1890s. Outside of Oklahoma with its continual "land rushes" on ceded Indian lands, the era of instant mining towns and sporadic migrations of populations was gone. Towns and county governments were now trying to provide the ordinary complement of municipal services for their constituents and a great many small educational systems were created to serve rural populations. As the automobile worked its way into the rural areas, people were able to travel farther and the old organization of school systems, the market areas of towns, and the financing of municipal services all changed radically.

By the end of the century there was fierce competition for school lands and lands within Indian reservations became subject to state encroachment when they were classified as "school lands." The Act of March 2, 1901[41] allowed a state to test its rights to school lands without enjoining the tribe as a party if the Secretary of the Interior was made a party. However the duty of representing the tribe affected fell to the Attorney General under the statute whether the tribe was involved or not.

Four basic areas of concern began to emerge in federal-state relations regarding Indians that became the vital areas in later legislation. They were: 1) tuition payments to state and local school districts for educating Indian students, 2) transfers of federal lands, sometimes Indian lands, sometimes public lands, in exchange for school districts providing educational services, 3) funds for construction of new consolidated schools serving both Indian and non-Indians, and 4) provisions for states to handle certain aspects of Indian health.

In the first category, tuition payments to school districts, there were both general and specific laws authorizing the Secretary of the Interior to make payments. The Act of June 7, 1924[42] is typical of the general statutes passed to provide this authority. It continued authority given by statute for the two previous years and directed the Secretary of the Interior "to pay any claims which are ascertained to be proper and just, whether covered by contracts or not, for tuition of Indian pupils in State public schools." An example of specific statutes is the Act of February 13, 1922[43], a Joint Resolution, which allowed the President to pay tuition of the Montana Indian children.

In the second category, transfers of lands to school districts in exchange for services, the Act of March 31, 1908[44] authorizing the Secretary of the Interior to issue a patent for certain lands of the Santee Reservation to school district number thirty-six in Knox County, Nebraska, is a typical example. This type of legislation has increased notably since the Second World War as school districts have grown and land has become valuable for building large schools. Land transfers are one aspect of Indian education that cannot be allocated by Congress to any other government department because the major task of the Secretary of the Interior is to hold Indian lands in trust.

The Act of August 28, 1957[45] is unusual in this respect. It allows the Secretary of the Interior to transfer 70 acres to the State of North Dakota for use as the North Dakota State School of Science, on the specific condition that the school "shall make available for each of its school years, for a period of ten school years, free tuition to ten qualified Indians who wish to attend such school during such school year."

The third category, funds for construction of schools, was a direct result of treaty promises by the government to provide schools for the different tribes. For the most part there had not been a systematic effort outside of day schools to provide a decent education for Indian children. One of the early statutes, the Act of June 13, 1929[46], a Joint Resolution, amended an appropriation for the construction of a consolidated school at Turtle Mountain "Provided, That such school shall be open for attendence by white children and by restricted or nonrestricted Indian children" if the state paid its tuition to the federal government to supplement federal appropriations used for the operation of the school.

In the succeeding years special acts were passed on behalf of school districts in Browning, Montana[47], Frazer, Montana[48], Mahnomen and other counties in Minnesota[49], Cass County, Minnesota[50], Hunter School District, Wisconsin[51], Owyhee, Nevada[52]

Hoopa, California[53], Walker, Minnesota[54] and several other school districts. The passage of 815 allowed numerous school districts to use those funds for federally impacted areas which, in reality, had been at least a part of the reasoning behind the federal statutes on a district by district basis.

The final category, state responsibility for Indian health conditions, evolved from a general concern, by state officials, for prevention of epidemics. The Act of February 15, 1929[55] directed the Secretary of the Interior to permit agents and employees of the states to enter Indian lands to inspect health and educational conditions or to enforce school attendence under rules and regulations prescribed by the Secretary of the Interior. This law was amended by the Act of August 9, 1946[56] providing that state agents could not enter any reservation in which a duly constituted tribal government existed "until such body has adopted a resolution consenting to such application" (to enter).

While the Johnson-O'Malley Act had allowed the Secretary of the Interior to contract with states for health services, the Indian Health Service usually provided services for most reservation Indians. There were, however, specific statutes which made provisions for certain services for Indians. The Act of August 4, 1947[57], for example, provided funds for construction of a tuberculosis sanatarium, the Act of April 3, 1952[58] allowed the Secretary of the Interior to make Indian health facilities available to non-Indians in remote areas, and the Act of August 31, 1957[59] allowed the Surgeon General to contract with the Bernalillo County Hospital in New Mexico to provide services for the Pueblo Indians.

E. Summary and Conclusion

We have seen in this section that allocation of the legal responsibilities of the federal government for Indians has historically been directed to the agency or department which Congress best feels can perform the function. In recent years as new departments have been authorized, Congress has allocated functions to these departments on the basis of specific programs. HEW, HUD, and Labor have become important departments in the fulfillment of federal obligations to Indians. The trend of development with respect to these departments has been one in which initial treaty obligations have been partially fulfilled by the Interior and War Departments in the 1800s, followed by a long period of neglect in which individual statutes have been passed directing services for specific tribes, and these statutes have gradually been understood as covering a specific area of general national need which can be handled by major legislation to which Indians become related.

In the concluding section of this paper we will trace the specific legal doctrines which enable us to identify the nature of the legal obligations of the various departments of the federal government in Indian education and other services.

IV. INTERPRETATION OF THE LEGAL RESPONSIBILITY OF THE FEDERAL GOVERNMENT IN THE FIELD OF INDIAN EDUCATION

A. Introduction

In the preceding sections we have reviewed the history of legislation dealing with Indians and Indian rights, the specific articles of treaties and the proceedings of treaties which give Indian tribes legal rights to educational services, and the history of congressional allocations of the legal obligations of the United States to the various departments of the federal government and the state and private agencies.

It remains to be seen, however, the manner in which the executive branch, the legislative branch, and the judicial branch of the federal government have viewed their legal obligations and whether or not they have consistently worked toward a definition of Indian rights consistent with the histories and treaties outlined above. In the case of each of these branches of government one can show two consistent interpretations of the legal obligation to Indians mixed together. One theory sees the legal obligation as being best fulfilled by severing the legal relationship between the Indian communities and the

United States as quickly as possible. Proponents of this theory have generally been discredited by the movement of historical events. When legislation or court decisions seem to uphold this theory, the actual conditions of Indians are always present as a silent disclaimer of the theory of "terminating" Indian rights.

The other theory which consistently emerges in each period of American history views the legal obligations of the United States to Indians as an ongoing commitment to provide sufficient services to enable Indian communities to make a comfortable transition from their former way of life to a new way of life consistent with the conditions of the time and the consent and understanding of the Indians. We are presently in a period of American history where this theory dominates social and legal concerns of the federal government.

We will review, in this concluding section of the paper, expressions by the respective branches of the federal government of concern for the continued support of Indian programs and the manner in which each branch has understood the legal obligations of the federal government. In recent years this sense of legal obligation has become popularly known as a "trust" responsibility and the definition of "trust" has expanded with the advent of self-government under the Indian Reorganization Act because of the requirements, under that act, that the Secretary of the Interior review decisions made by Indian communities in the exercise of their powers of self-government.

We will not limit our discussion to the exercise of the Secretary of the Interior's powers of review of political decisions made by Indian communities under his supervision for two basic reasons. First, not all communities are presently under his supervision because of the anomalies of history and recent actions of the Congress would seem to indicate that it now prefers to spread the legal obligations of the United States to Indians to a number of government departments rather than to place all Indians and all programs under the Department of the Interior.

Second, and perhaps more important, the legal obligation of the United States is more dependant upon the actions of the courts and the Congress than upon the executive branch. Congress passes legislation affecting or relating to Indians on the basis of its Constitutionally directed powers. The courts interpret statutes and treaties in the context of preceding legal theories and the historical context in which they understand the development of the legal obligations of the United States. Both the courts and the Congress have frequently understood the responsibility of the federal government in a much more profound sense than has the Secretary of the Interior. The mounting number of claims filed by the Indian tribes against the federal government on the basis of inadequate performance by the Interior Department of its legal obligations to Indian tribes is an eloquent testimony of this fundamental fact of political existence for Indian communities.

B. The Executive Branch

From the very beginning of the republic Presidents have seen their duty as partially involving an articulation of the policies and the programs which they feel come under the general responsibility of the United States as assumed in treaties with the Indian tribes or as a result of the encroachment of citizens of the United States upon Indian communities. Presidential messages regarding Indians are often a matter of articulating the political realities of the time and thus many Presidential messages reflect considerations of importance to land settlements, establishment of reservations, and definitions of the relationship between the responsibility of the United States for Indians and the general technological advances of the day.

George Washington, the first American President, in his Eighth Annual Address, given December 7, 1796, reflected the political realities of his time and his concern for making some provisions to provide a more comprehensive relationship with the Indian tribes:

> Measures calculated to insure a continuance of the friendship of the Indians and to preserve peace along the extent of our interior frontier have been digested and adopted. In the framing of these care has been taken to guard on the one hand our advanced settlements from the predatory incursions of those unruly individuals who cannot be restrained by their tribes, and on the other hand to protect the rights secured to the Indians by treaty -- to draw them nearer to the civilized state and inspire them with correct conceptions of the power as well as the justice of the Government.[1]

In his First Inaugural Address, James Madison expanded on Washington's conception and remarked:

> The hunter state can exist only in the vast uncultivated desert. It yields to the more dense and compact form and greater force of civilized population; and of right it ought to yeild, for the earth was given to mankind to support the greatest number of which it is capable, and no tribe or people have a right to withhold from the wants of others more than is necessary for their own support and comfort. It is gratifying to know that the reservations of land made by the treaties with the tribes on Lake Erie were made with a view to individual ownership among them and to the cultivation of the soil by all, and that an annual stipend has been pledged to supply their other wants. It will merit the consideration of Congress whether other provisions not stipulated by treaty ought to be made for these tribes and for the advancement of the liberal and humane policy of the United States toward all the tribes within our limits, and more particularly for their improvement in the arts of civilized life.[2]

Congress, as we have seen in sections one and three of this paper, had already made provisions for a general Indian program of the kind described by Madison in its various enactments relating to the administration of Indian Affairs. Yet the recognition by the President that even with the best conditions having been established in the treaties an additional overture by the United States was necessary indicates the understanding by the executive branch of the need to consider the legal obligations of the United States in the broadest, not the narrowest sense.

James Monroe sent a special message to Congress in March of 1824 and after discussing the subject of Indian removal which was the difficult political question of his day, suggested to the Congress that:

> Considerations of humanity and benevolence, which have now great weight, would operate in that event

> with an augmented force, since we would feel sensibly the obligation imposed on us by the accommodation which they thereby afforded us. Placed at ease, as the United States would then be, the improvement of those tribes in civilization and in all the arts and usages of civilized life would become the part of a general system which might be adopted on great consideration, and in which every portion of our Union would then take an equal interest. These views have steadily been pursued by the Executive, and the moneys best calculated, according to its judgment, to produce this desirable result, as will appear by the documents which accompany the report of the Secretary of War.[3]

In December 1868, President Andrew Johnson in his Fourth Annual Message to Congress discussed the series of treaties signed with the tribes of the Great Plains and Rocky Mountains earlier that year by the Sanborn Commission and the responsibility of the United States as a result of these treaties.

> Treaties with various Indian tribes have been concluded, and will be submitted to the Senate for its constitutional action. I cordially sanction the stipulations which provide for reserving lands for the various tribes, where they may be encouraged to abandon their nomadic habits and engage in agricultural and industrial pursuits. This policy, inaugurated many years since, has met with signal success whenever it has been pursued in good faith and with becoming liberality by the United States. The necessity for extending it as far as practicable in our relations with the aboriginal population is greater now than at any preceding period. Whilst we furnish subsistence and instruction to the Indians and guarantee the undisturbed enjoyment of their treaty rights, we should habitually insist upon the faithful observance of their agreement to remain within their respective reservations. This is the only mode by which collisions with other tribes and with the whites can be avoided and the safety of our frontier settlements secured.[4]

In December 1889, President Benjamin Harrison presented his First Annual Message to the Congress. Four states had been added to the Union during the year, Washington, Montana, North and South Dakota, and their admission had required the breakup of the massive Sioux reservation in Dakota[5] and the reduction of the larger reservations in the other states. Thus Harrison saw the duty of the United States in particularly vivid terms for he knew that many of the lands of the Indian tribes were now lost to them forever.

President Harrison remarked:

> Our treaty stipulations should be observed with fidelity and our legislation should be highly considerate of the best interests of an ignorant and helpless people. The reservations are now generally surrounded by white settlements. We can no longer push the Indian back into the wilderness, and it remains only by every suitable agency to push him upward into the estate of a self-supporting and responsible citizen. For the adult the first step is to locate him upon a farm, and for the child to place him in a school.[6]

Finally President Nixon, in his July 8, 1970 message on Indians, confirmed the long history of deprivation of legal rights and summarized the understanding of the executive branch of the legal obligations of the United States to Indian people.

> Termination implies that the Federal government has taken on a trusteeship responsibility for Indian communities as an act of generosity toward a disadvantaged people and that it can therefore discontinue this responsibiltiy on a unilateral basis whenever it sees fit.
>
> But the unique status of Indian tribes does not rest on any premise such as this.
>
> The special relationship between Indians and the Federal government is the result instead of solemn obligations which have been entered into by the United States Government. Down through the years, through written treaties and through formal and informal agreements, our government has made specific commitments to the Indian people. For their part,

> the Indians have often surrendered claims to vast tracts of land and have accepted life on government reservations. In exchange, the government has agreed to provide community services such as health, education and public safety, services which would presumably allow Indian communities to enjoy a standard of living comparable to that of other Americans.[7]

The present stance of the executive branch is the fulfillment of these promises.

C. The Legislative Branch

We have already seen many instances in which Congress, by legislation, has provided services to Indian communities. The motives have often been mixed with some members of Congress as eager to assimilate Indians into American society as they have been willing to uphold the rights derived under treaty. But the fact remains that generally Congress has recognized the debt of the United States to the Indians in both the moral and legal sense. Speeches of members of Congress make this point clear.

While debating the transfer of abandoned military posts to the Secretary of the Interior for use as schools for Indian education, Representative Holman from Indiana summarized the view held by many people in Congress concerning the issue:

> Mr. Speaker, from a hasty examination of this bill it seems to me a very proper measure. Where the Government has abandoned its military posts in the West, it would seem to be eminently proper that those ancient agencies of oppression and wrong toward the Indian tribes should be made available to enable the Government to display something like the national humanity which it owes to these native tribes. I think, sir, that when the history of the last one hundred years shall be written it will be a pleasant thing for our children to find here and there a green spot in reference to

> our treatment of the Indians - an expression of national sympathy and national honor toward these disappearing tribes.
>
> For myself, I am willing to go to any reasonable extent in aiding these remnant of the tribes to advance in the path of progress and development.[8]

Mr. Deering of Iowa added his endorsement to the bill in words somewhat similar to those of Mr. Holman:

> I am glad, Mr. Speaker, that the right way has been found at last. We have determined to devote attention to the Indian children, to educate them and train them up in habits of industry. The industrial policy is the all-important one. They must be made to understand that if they wish clothing and food and other necessaries of life they must work for them and earn them as white people do.[9]

When the Snyder Act was under consideration there was considerable debate over the effects of the legislation. For as long as most congressmen could remember the Indian appropriations had been listed item by item according to the treaty obligations to each tribe. Over the years individual congressmen had objected to individual items in the appropriations bill. But generally when items were omitted in the House of Representatives they were promptly inserted again in the Senate and survived the conference between the two houses.

Consequently the major debate over the Snyder Act was not that it would undertake any additional responsibilities which were not legal obligations of the United States, but rather that it would preclude individual Congressmen from making procedural objections to various items which generally passed anyway. Mr. Kelly of Pennsylvania summarized the Snyder Act as follows:

> Mr. Chairman and gentlemen of the committee, this measure simply makes in order the items which have been carried for many years in the Indian appropriation bills. I helped to take a number of these items out of the last Indian bill through points of order, but it was the most futile effort possible, for they were reinserted in the Senate and in the end nothing was accomplished.[10]

A lenghty debate ensured as congressmen wanted assurance that the bill would not enlarge the powers of the Commissioner of Indian Affairs to increase expenditures arbitrarily. Mr. Carter from Oklahoma gave his understanding of the bill:

> The bill does not undertake the enlargement or creation of a single activity which is not now in operation by the Indian Bureau. It simply provides for making certain appropriations in order for activities which have been carried along from year to year by appropriations of money for that year without any special authorization for the work.[11]

Mr. Andrews asked specifically: "Will this bill do anything more than to prevent points of order on the Indian appropriation bill?"[12] And Mr. Carter replied:

> Absolutely nothing else. It does not start a single additional agency in the Bureau of Indian Affairs, it does not enlarge their activities, and does not create any new activities. It does nothing more than protect the committee reporting the bill against the whims and peevishness of some Member attacking the bill.[13]

It is illuminating to see in the House debate over the Snyder Act, which has sometimes been called the most far-reaching bill in American history in providing authority to the Bureau of Indian Affairs in providing services to Indians, that the members of the House did not consider the bill to authorize any new functions. The understanding of the House members is rather that the bill continues the essential legal responsibility of the United States in the field of Indian Affairs and simply eliminates the "peevishness" of some members in making objections.

Other debates on other pieces of legislation could be cited to indicate that in general Congress has felt that the nature of the federal legal obligation to Indians is combined with the moral demands placed upon the United States as long ago as the Ordinance of 1787 so that all services provided to Indians are really the legal obligations of the United States.

D. The Judicial Branch

The majority of the cases interpreting treaties and agreements have revolved about the nature of Indian land titles[14] and the preservation of property rights.[15] Sometimes the political status of Indian tribes has been discussed[16] or the nature of the civil and criminal jurisdiction assumed by the United States[17] or the individual states over lands within Indian reservations.[18] It is difficult to find specific mention of the responsibility of the United States outside of these fields but considerable case law does exist.

The Seminole Nation, in a prolonged case in the Court of Claims, litigated the educational provisions of its 1856 treaty which, as we have seen in the section on treaties, set aside a fund for education. The Supreme Court, in discussing the liability of the United States for misapplication of the tribe's funds, stated:

> Furthermore, this Court has recognized the distinctive obligation of trust incumbent upon

> the Government in its dealings with these dependent and sometimes exploited people. E.g. Cherokee Nation v. Georgia, 5 Pet. 1; United States v. Kagama, 118 U.S. 375; Choctaw Nation v. United States, 119. U.S. 1; United States v. Pelican, 232 U.S. 442; United States v. Creek Nation, 295 U.S. 103; Tulee v. Washington, 315 U.S. 681. In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.[19]

There are, of course, numerous descriptions of this trust with which the United States is charged, but perhaps more important is the feeling of the courts of the obligation they see in interpreting treaties and agreements between tribes and the United States. The usual rule of interpretation of treaty articles is that the wording shall not be interpreted in detriment to the tribes but in the manner in which they would have naturally understood the promises of the treaty commissioners at the time of signing.

E. Eligibility for Federal Services

There remain some fundamental questions regarding the present role of the various government departments in the field of Indian Affairs. Does general national legislation apply to Indians because of their citizenship? Are Indians brought under the provisions of general statutes because they share a general need that is comparable to the needs of legislatively defined groups? What is the status of Indian groups with respect to other groups such as states, federal agencies, and local institutions? And finally, is there a distinction between so-called "federal Indians" and "non-federal Indians" with respect to federal responsibilities?

At present we see some tensions existing between the different government departments regarding Indian services and between so-called "federal" and "non-federal" Indians. Much of this tension is inspired and induced by the failure of the federal government to clarify its own understanding of the role of Congress in exercising its plenary powers over Indian matters and the failure of Congress to make a clear and precise statement of its responsibility for Indian matters. We must rely upon Indian case law and the incidents of history in the absence of any further statement by Congress to determine the scope of federal services which shall be made available to Indians in the United States today.

Because in recent years there have been a number of laws passed allocating various service functions to departments of government other than the Interior Department we cannot assume that definitions of eligibility for federal services for Indians rest primarily upon the definitions set down by the Interior Department. With each new statute that includes Indians in the variety of federal programs, new determinations of eligibility are required. The recent Joint Resolution establishing the American Indian Policy Commission made provisions for reservation, non-federal and urban Indians in the composition of the Indian membership indicating a Congressional concern for the totality of Indian problems and was an acknowledgment that Congress, in some manner or another, understands its function of relating to all Indian communities.

This concept is not a recent development. We have seen in the various Civilization acts that the intent of Congress was to provide against the final extinction of Indians. The civilization laws do not exclude tribes that have not yet signed treaties or tribes having a relationship other than federal. The concept seems to hold whenever we look at various pieces of federal legislation. The Snyder Act of 1921 reemphasizes this doctrine of total responsibility for Indian matters by directing the Secretary of the Interior to:

> ...direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States....[20]

The Johnson-O'Malley Act clearly authorized the Secretary of the Interior:

> ...in his discretion, to enter into a contract or contracts with any State or Territory having legal authority to do so, for the education, medical attention, agricultural assistance, and social welfare, including relief of distress, of Indians in such State or Territory, through the qualified agencies of such State or Territory, and to expend under such contract or contracts moneys appropriated by Congress for the education, medical attention, agricultural assistance, and social welfare, including relief of distress of Indians in such State.[21]

Obviously there is no distinction in this authorization between reservation or federal Indians and other Indians or between the States having federal Indians and those not having Indians.

Congress has made it plain, in those cases in which it wished specific states to have authority over Indians or a specific relationship with Indians, by citing the states by name to which authority is given. The famous P. L. 83-280 which gave civil and criminal jurisdiction over Indian reservations plainly lists those states by name over which Congress wished state laws to be extended.

In the General Allotment Act and the Indian Reorganization Act, Oklahoma Indians are specifically excluded. Later they are given the benefits of the Indian Reorganization Act under the Oklahoma Indian Welfare Act [22] and made subject to the General Allotment policy by specific acts of Congress ratifying agreements made with them.[23] This exclusion of specific tribes from provisions of some acts and their later inclusion in the provisions of the acts by special legislation is an indication that unless Congress specifically excludes tribes or classes of Indians from the operation of laws dealing with Indians, all Indians are included.

The general articulation of this doctrine of including Indians of all kinds in Indian legislation unless specifically excluded is best seen in the statement by the Supreme Court in the Sandoval case:

> Not only does the Constitution expressly authorize Congress to regulate commerce with Indian tribes, but long-continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subse-

> quently acquired, and whether within or without the limits of state(s).[24]

This doctrine does not conflict with the other usually cited doctrine of the Sandoval decision that:

> ... it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts.[25]

If, in a general statute providing services for all Indians or Indians throughout the United States, Congress allocates a legal responsibility or directs a government department to provide a service, the plain meaning of the statute must become determinative of the law.

F. General Laws of the United State and Their Applicability to Indians

A fundamental distinction exists with respect to Indians that does not exist with respect to other American citizens. From the very beginning of the legal relationship between Indians and the United States, it has been the rule that "General Acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them."[26] (Elk v. Wilkins, 112 U.S. 94, 1884). The Constitution prohibits the application of general laws to Indians (Constitution, art. 1, sects. 2, 8; art. 2, sect. 2) and case law from Cherokee Nation v. Georgia[28] (5 Pet. 1. 1831) until the present time supports and buttresses this interpretation.

Aside, therefore, from the legal obligations required of the United States by treaties and agreements, Indians, insofar as they are members of an Indian community, are excluded from the operation of laws that affect other citizens. It must then follow that where Congress has specifically mentioned Indians in a statute or where legislation is specifically passed which deals with Indians, that the Congress is exercising its special powers of supervision and fulfilling its legal obligations in the field of Indian Affairs.

The process by which treaty rights and general legal obligations to Indians assumed under civilization statutes by the federal government are translated into legislative action and thence into programs must take the following course. First, there must be a treaty right, a right acquired under an agreement or a statute, or an acknowledgment by Congress of responsibility for Indians in a certain area even if no previous definition of that responsibility existed. Then a specific statute must be passed which defines the extent of that responsibility and directs a certain government department or agency to assume that responsibility in program form.

Once responsibility for Indian programs is given to a government department it then has that responsibility until relieved of it by act of Congress. The most common mistake in understanding the status of Indians with respect to departments other than the Interior Department is the assumption that the responsibility flows from Congress to the Interior Department and thence to other government agencies. However no legislation reflects that view that does not specifically include that procedure. The Elementary and Secondary Education Act of 1965 in fact reverses that assumed procedure by making the Secretary of the Interior apply to the Commissioner of Education for funds to be used in Bureau of Indian Affairs schools. We must conclude, therefore, that unless a specific procedure is written into the law, Congress intends the responsibility to flow directly from itself to the department concerned.

We see in most social legislation of the last two decades a pattern in which the above sequence is followed almost precisely. The original 815 and 874 laws are not applicable to Indians until Indians have been specifically included in the amendments of these laws. With each additional amendment the responsibility to provide programs for Indians increases and eventually Indian tribes become sponsoring agencies as defined by the amendments of the Indian Education Act of 1972.[29]

Much the same pattern has existed with regard to economic development, housing programs, and surplus commodities and food stamps. Indians were not included in the original Housing Act of 1949 but over the years as Congress extended its conception of the nature of housing programs funded by the federal government Indians began to receive the benfits of the program by specific amendments. The 1969 amendment to the Housing Act of 1949 contains the specific definition that "The term 'State' includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Trust Territory of the Pacific Islands, the territories and possessions of the United States, and Indian tribes, bands, groups, and nations, including Alaska

Indians, Aleuts, and Eskimos, of the United States."[30]

The inclusion of Indians in the Agricultural Act of 1949 for surplus commodities indicates the same pattern. The 1954 amendment allows transfer of surplus commodities to the "Bureau of Indian Affairs and to such State, Federal, or private agency or agencies as may be designated by the proper State or Federal authority and approved by the Secretary, for use in the United States in nonprofit school-lunch programs, in the assistance of needy persons, and in charitable institutions, including hospitals, to the extent that needy persons are served..."[31] The 1959 amendment authorizes the Secretary of Agriculture to "promulgate and put into operation a program to distribute to needy persons in the United States, including needy Indians, through a food stamp system such surplus food commodities."

The Civil Rights Bill of 1964,[32] mentions in its definition of employer in Title VII - Equal Employment Opportunities - "an Indian tribe" as those entities which are covered under specific exclusions from the definition. The Emergency Employment Act of 1971[33] includes under eligible applicants in Section 4, "(3) Indian tribes on Federal or State reservations."

We can conclude, therefore, that in recent times Congressional thinking has evolved in determining that Indians are to be regarded as a special class of citizen with specific eligibility for programs and that Congress has specifically amended numerous laws to provide special treatment of Indians. Where the benefits are restricted to a certain class of Indians, the language in the act or amendment specifically mentions the class and absent a direct mention of restrictions, Indians as a group are generally eligible for programs under recent amendments.

G. The Basis of Present Distinctions Among Indians

In spite of the general applicability of recent social welfare legislation covering Indians and Indian tribes, there remains the problem of the distinction between so-called "federal" Indians and so-called "non-federal" Indians which we see in the practical administrative operation of programs by government departments. To understand this distinction we must understand the radical change in political status which came about in the Indian Reorganization Act of 1934.

Under the I.R.A. tribes and reservations were given a new type of political status which complemented their original status as dependent domestic nations. Tribes and residents of reservations were allowed, under Section 16 to organize "for its common welfare and ... adopt an appropriate constitution and bylaws." Tribes received an approved constitution from the Secretary of the Interior and part of the governing powers of the newly recognized government were to "negotiate with the Federal, State, and local Governments."

The question immediately arose during the Depression of whether or not this new status had changed the nature of tribal governments. The Solicitor of the Interior Department, in connection with a question of whether or not a ruling of the Attorney General of North Dakota to the effect that a state crop mortgage law did not apply to mortgages made to an Indian tribe, for the reason that such tribe was deemed an "agency" of the United States, made the following ruling:

> This Department has previously held in various connections that an Indian tribe, particularly where incorporated, is a Federal agency. In the Solicitor's Opinion M. 27810, of December 13, 1934, the following statement is made:
>
> 'The Indian tribes have long been recognized as vested with governmental powers, subject to limitations imposed by Federal statutes. The powers of an Indian tribe cannot be restricted or controlled by the governments of the several States. The tribe is, therefore, so far as its original absolute sovereignty has been limited, an instrumentality and agency of the Federal Government.
>
> 'Various statutes authorize the delegation of new powers of government to the Indian tribes. The most recent of such statutes is the Wheeler-Howard Act, which sets up as one of the primary objectives, the purpose 'to grant certain rights of home rule to Indians." This Act contemplates the devolution to the duly organized Indian tribes of many powers over property and personal conduct which are now exercised by officials of the Interior Department. The granting of a Federal corporate charter to an Indian tribe confirms the character of such a tribe as a Federal instrumentality and agency.[34]

This change of status has meant that when legislation has been passed which provides that political subdivisions are eligible as agencies for sponsoring or administering federal programs, Indian tribes have been understood as comprising, for the purposes of this legislation, political subdivisions of the federal government.

Recognition of federal tribal governments as sponsoring agencies has in no wise altered the rights derived under treaty or changed the general assumption of services for Indians by the United States. Rather this recognition has segregated tribal governments from the general Indian population as entities capable of administering programs. The general legal obligation to serve Indians remains a federal responsibility. The Indian Self-Determination and Education Assistance Act of 1975[35] may indicate a high water mark in affirming the corporate status of federally chartered Indian tribal governments.

The responsibility for individual Indians, regardless of background continues to be affirmed in the Indian Education Act of 1972 which allows any school district with ten or more Indian students to receive funds for Indian education and which makes all Indian organizations, not simply tribal governments, eligible to participate in educational programs. Education, in the larger and more historic context, can be seen as the interest area in which "civilization" occurs and thus the act of 1972 stands well within the historic context of providing funds for Indians in both intent of Congress and in determining eligibility of Indian participants.

H. Summary and Conclusion

The trend today is definitely in the direction of expanding federal services to Indians, re-affirming treaty and agreement rights, buttressing tribal sovereignty and jurisdiction, and promoting Indian control of institutions. At present no definite theory of the status of Indian tribal governments or groups of a comprehensive nature has evolved but with the American Indian Policy Commission authorized to study and determine the present conditions of Indian people, the possibility exists that a clear definition of Indian rights, governments, and responsibilities may emerge.

While the tendency of earlier statutes, policies and programs may have been to encourage assimilation or increase the rate of absorption of Indians into American life, the current policies and programs are designed to strengthen Indian life and culture and to ensure the continued corporate and tribal existence of Indians. When we remember that the first "civilization act" was to prevent the extinction of Indians, the present programs seem to be the fulfillment of those initial [illegible]s.

The preambles to a great many of the Indian treaties speak of "perpetual friendship" between the Indians and the United States. It has been difficult to define exactly what this friendship was or how it was to be constituted. As we have seen the Ordinance of 1787 set down certain guidelines for the treatment of Indians and established that "laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them."

Federal assumption of a multitude of responsibilities in social welfare areas by developing programs specifically for Indians and qualifying tribal governments as federal agencies eligible for sponsorship of programs seems to be the manner in which the federal government is fulfilling today these ancient promises. It thereupon becomes the responsibility of each department that receives a mandate from the Congress to perform certain functions for Indians to shoulder its portion of the legal obligations of the United States and fulfill them to the best of its ability.

FOOTNOTES TO SECTION ONE

1. 7 Stat. 13, Article 6.

2. 7 Stat. 18, Article 12.

3. See Peake, Ora Brooks, A History of the United States Indian Factory System, 1795-1822. Sage Books, Denver, 1954.

4. See Treaty with the Wyandot, et al, Januray 9, 1789 (7 Stat., 28) Article VII for civil jurisdiction, Article IX for criminal jurisdiction.

5. Treaty with the Wyandot, et al, January 21, 1785 (7 Stat. 16).
   Article V. If any citizen of the United States, or other person not being an Indian shall attempt to settle on any of the lands allotted to the Wiandot and Delaware nations in this treaty, except on lands reserved to the United States in the preceding article, such person shall forfeit the protection of the United States, and the Indians may punish him as they please.

6. See Treaty with the Creeks, August 7, 1790 (7 Stat. 35).
   Article VII
   No citizen or inhabitant of the United States shall attempt to hunt or destroy the game on the Creek lands: Nor shall any such citizen or inhabitant go into the Creek Country, without a passport first obtained from the Governor of some one of the United States, or the officer of the troops of the United States commanding at the nearest military post on the frontiers, or such other person as the President of the United States may, from time to time, authorize to grant the same.

   See also the Act of March 30, 1802 (2 Stat. 139) Section 3.

7. 1 Stat. 49.

8. 1 Stat. 50.

9. 1 Stat. 123.

10. The "Western Reserve Lands" of Connecticut and New York in Ohio for example.

11. 1 Stat. 54.

12. 1 Stat. 137.

13. 1 Stat. 419.

14. 1 Stat. 743.

15. 2 Stat. 6.

16. Act of May 13, 1800 (2 Stat. 85).

17. 2 Stat. 139.

18. 2 Stat. 829.

19. 8 Stat. 214.

20. See Kansas or Kaw Indians v. United States, 80 C. Cls. 264 at 302 (1934) where the Court of Claims in interpreting an 1815 treaty stated:
"...the stipulation that the plaintiff tribe acknowledged itself to be under the United States and no other nation in no way divested the plaintiff tribe of its sovereign power to enter into treaties with the United States on equal terms or lessened its obligations under such treaties when made. The purpose and effect of the treaty were to place the contracting parties on the same footing in every respect upon which they stood before the war with Great Britain. No contemplation is made that the relationship of guardian and ward existed between them before the war. Certainly this relationship could not be created by a treaty that merely reestablished their preexisting political relations.

21. 3 Stat. 383.

22. 3 Stat. 428.

23. 3 Stat. 516.

24. Sioux tribe of Indians v. United States, 64 F. Supp. 312 at 325 (1946).

25. 4 Stat. 514.

26. 4 Stat. 564.

27. 4 Stat. 729.

28. 4 Stat. 735.

29. 9 Stat. 203.

30. 9 Stat. 395.

31. 9 Stat. 437.

32. 10 Stat. 2.

33. 12 Stat. 427.

34. 14 Stat. 347.

35. 15 Stat. 17.

36. 15 Stat 581.

37. 15 Stat. 589.

38. 15 Stat. 593.

39. 15 Stat. 619.

40. 15 Stat. 635.

41. 15 Stat 649.

42. 15 Stat. 655.

43. 15 Stat. 667.

44. 15 Stat. 673.

45. 15 Stat. 228.

46. 16 Stat. 544, 566.

47. 17 Stat. 136.

48. 17 Stat. 484.

49. Act of March 3, 1873, 17 Stat. 623.

50. 19 Stat. 58.

51. 22 Stat. 181.

52. Act of May 17, 1884, 23 Stat. 24.

53. 33 Stat. 616.

54. Discrimination seemed to be the fate of Alaska Natives under both territorial and federal and missionary schools. In the case *In re Petition of Can-Ah-Couqua for Habeas Corpus*, 29 Fed. 687 (1887) an Indian mother was refused the right to take her child from a mission school because, in the words of the court:

> It is the experience of those who have been engaged in these Indian schools that, to make them effectual as disseminators of civilization, Indian children should, at a tender and impressionable age, be entirely withdrawn from the camp, and placed under the control of the schools.

It was no better for Indians who tried to adapt to the life of the white man. In *Davis v. Sitka School Board*, (3 Alaska 481) (1908) Indian children of mixed blood ancestry tried to gain admission to the Sitka schools. The court ruled against their petition on the basis that they were "not civilized," even though their stepfather, an Indian, was a prosperous businessman in Sitka. According to the court: 'Civilization, though, of course, the term must be considered relative, includes, I apprehend, more than a prosperous business, a trade, a house, white man's clothes, and membership in a church. The burden of establishing that the plaintiffs live the civilized life is upon them and I fail to find in the testimony evidence of a condition that inclines me to the opinion that the Davis children have that requisite.'

55. Act of February 25, 1884 (23 Stat. 268).

56. 31 Stat. 950.

57. 24 Stat. 388.

58. Act of May 8, 1906 (34 Stat. 182, 183).

59. Cohen, Felix. *Federal Indian Law*, University of New Mexico Press, Albuquerque, New Mexico, 1970. p. 26.

60. 41 Stat. 350.

61. 43 Stat. 253.

62. 42 Stat. 208.

63. Act of June 14, 1934 (48 Stat. 984).

64. Act of April 16, 1934 (48 Stat. 596).

65. Act of June 4, 1936 (49 Stat. 1458).

66. 54 Stat. 1125.

67. Act of August 8, 1953 (67 Stat. 530, 536).

68. Act of August 15, 1953.

69. Act of August 5, 1954 (P.L. 83-568).

70. Annual Report of the Secretary of the Interior, (1936) pp. 169-172.

71. P.L. 87-27.

72. P.L. 88-452.

73. P.L. 88-560.

74. P.L. 88-352.

75. P.L. 91-230.

76. P.L. 81-874.

FOOTNOTES TO SECTION TWO

1. Sioux Tribe v. United States, 84 C. Cls. 16, at 37 (1936) the Court of Claims notes:

   > The ones who suffered substantial damages were the children themselves. Granting that the loss of an English education in its elementary branches might handicap one in his transition from a tribal Indian to the habits, customs, and mode of life of the Whites, how may it be reduced to dollars and cents? Juvenile education might and probably would have had a degree of civilizing influence on the tribe as a whole, but again the measuring of damages, making restitution for an alleged loss in money, is one which in itself resists calculation.

2. (Civil No. 9213, W.D. Washington, February 12, 1974).

3. Sioux Tribe v. United States, 84 C. Cls. 16, at 26 (1936) the Court of Claims notes:

   > The record establishes that for a long period of time the Government did not strictly observe the provisions of the seventh article of the treaty of 1868 or Section 16 of the Act of 1889 with respect to furnishing the educational facilities provided for therein.

4. Osage Nation of Indians v. United States, 97 F. Supp. 381 (1951). In this case which involved determination of the use of funds derived from the sale of Osage lands under the treaty of 1865, the court noted:

   > However, no record whatsoever was kept of the negotiations involving the Osage treaty in suit.

Note: The remainder of the footnotes are taken from the National Archives Microfilm Copy; Microcopy T494; Roll No. 1; Introduction and Ratified Treaties, 1801-26; Record Group 75; BIA Records File. They will be cited according to the type of material, i.e. letter, instructions, journal, etc. and by Microfilm Frame, i.e. Frame 494.

5. Frame 366, Letter from Cherokee Chief, Path Killer to U.S.

Commissioner Joseph McMinn, dated 12 July 1818 and sent from Turkey Town.

6. Frame 393, and 394, Letter from Joseph McMinn, U.S. Commissioner to be read in open council, dated 18 November 1818 and sent from the Cherokee Agency.

7. Frame 408, Letter from the Cherokee National Committee of Chiefs and Warriors to Joseph McMinn, dated 21 November 1818 and sent from a council near the Cherokee Agency.

8. Frame 441, Letter from Governor Lewis Cass to the Hon. John C. Calhoun, Secretary of War, dated September 30, 1819 and sent from Detroit.

9. Frames 442 and 443.

10. Frames 444 and 445.

11. Frame 492, Letter from Commissioners Andrew Jackson and Thomas Hinds to John C. Calhoun, Secretary of War, dated 19 October 1820 and sent from the Choctaw Treaty Grounds.

12. Frame 439, Minutes of proceedings of Wm. P. Duval, James Gadsden, and Bernardo Segui, appointed by the President to hold a treaty with the Florida Indians, (Talk of Colonel Gadsden, 6 September 1823).

13. Frames 586 and 587, Letter from the Choctaw Delegation to John C. Calhoun, Secretary of War, dated 14 January 1825 and sent from Washington, D.C.

14. Frames 612 and 613, Letter from the Choctaw Delegation to John C. Calhoun, Secretary of War, dated 22 November 1824 and sent from Washington, D.C.

15. Frames 637 and 638, Journal of Proceedings of the Commissioners appointed to treat with the Creek Indians, 16 July 1824, Address to the Chiefs on 9 December 1824.

16. Frame 696, Letter from Governor William Clark to James Barbour, Secretary of War, dated 11 June 1825 and sent from St. Louis.

17. Frame 693, Letter from Governor William Clark to James Barbour, Secretary of War, dated 11 June 1825 and sent from St. Louis.

18. Roll No. 2; Ratified Treaties, 1827-32, Frame 443, Journal of Proceedings of a council held at Green Bay on 18 July 1831 by Colonel Stambuagh and the Menominees.

19. Frame 451, same council.

20. Roll No. 3, Ratified Treaties, 1833-1837, Frames 109 and 110, Council with the Pawnee Nation of the Platte River 9 October 1833, (Talk of Commissioner Henry Ellsworth).

21. Roll No. 4; Ratified Treaties, 1838-1853, Frame 236, Letter from William Armstrong, P.M. Buttes, and James Logan to T. Hartley Crawford, Commissioner of Indian Affairs, dated 4 January 1845 and sent from Fort Gibson.

22. Frame 301, Commissioners talk of Monday, November 10, 1845, from the Journal of Proceedings of a council of 3 November 1845 to 2 December 1845 between the Chippewas, Ottawas, and Pottawatomies and Commissioners George and T. P. Andrews.

23. Frame 308, Pottawatomies' written statement, Wednesday 12 November 1845.

24. Frame 310.

25. Frame 313.

26. Frame 313.

27. Frame 335, Commissioner Andrews, 16 June 1846.

28. Roll No. 5, Ratified Treaties, 1854-1855, Extract from a letter dated 20 December 1854 from Joel Palmer to Commissioner of Indian Affairs George Manypenny.

29. Frame 155, Extract from a letter dated 29 December 1854 from Superintendent Joel Palmer to Commissioner Manypenny.

30. Frame 176, Extracts from "Records of the Proceedings of the Commission to hold Treaties with the Indian Tribes in Washington Territory and the Blackfeet Country, (Proceedings of 26 December 1854).

31. Frame 178.

32. Frame 198, Excerpts from a letter dated 30 December 1854 from Governor Stevens to the Commissioner of Indian Affairs explaining various provisions in the treaty.

33. Frame 294, Excerpt from account of the treaty council proceedings, Governor Stevens explaining the treaty, 26 January 1855.

34. Frames 385-394, Extracts from an interview of 21 February 1855 between Commissioner of Indian Affairs and the Mississippi and Pillager Chippewas, conversation between Hole-in-the-Day and the Commissioner and H. M. Rice.

35. Frame 553, Extracts from "A true copy of the Record of the Official Proceedings at the Council in the Walla Walla Valley, held jointly by Isaac I. Stevens, Gov & Supt W. T. and Joel Palmer Supt. Ind. Affairs O. T. on the part of the United States with the Tribes of Indians named in the Treaties made at that council June 9th and 11th 1855.

36. Frames 902 and 903, Extracts from "Official Proceedings of the Council held by Governor Isaac I. Stevens, Supt Indian Affairs, W. T. with the Flathead, Pend Oreille and Kootenay Tribes of Indians at Hell Gate in the Bitter Root Valley, Washington Territory, commencing the seventh day of July, 1855, (Speech of Governor Stevens on July 19th).

37. Roll No. 6, Ratified Treaties, 1856-1863, Frames 613-615, Excerpt from an "interview of William P. Dole, Commissioner of Indian Affairs, with the Chippewa Indians from Lake Superior, March 3, 1863.

38. Frame 677 and 687, Excerpt from the Proceedings of 27 May 1863, Superintendent Hale listing the specific failures of the United States to live up to previous treaty.

39. Roll No. 7, Ratified Treaties, 1864-1868, Proceedings of the Indian Peace Commission, National Archives, Record Group 48, Volume 1, p. 99, Senator Henderson addressing the Cheyennes, Arapahos, Kiowas and Comanches at Medicine Lodge Creek, October 19, 1867.

40. Ibid., pp. 100-101.

41. Proceedings of the Indian Peace Commission, Vol. 2, p. 103, Commissioner John Sanborn addressing the Oglala Sioux at Fort Laramie, Wyoming Territory, May 24, 1868.

42. Proceedings of the Indian Peace Commission, National Archives, Record Group 48, Vol. 2, Letter of Gen. C. C. Augur to President, Peace Commission, October 4, 1868, re treaty negotiations with the Bannocks and Shoshoni.

FOOTNOTES TO SECTION THREE

1. 7 Stat. 13.
2. Cohen, Felix, Federal Indian Law, p. 9.
3. Act of August 7, 1789 (1 Stat. 54).
4. 1 Stat. 67, 68.
5. 1 Stat. 279.
6. Act of April 18, 1796 (1 Stat. 452).
7. Act of April 21, 1806 (2 Stat. 402).
8. Act of May 6, 1822 (3 Stat. 679).
9. 4 Stat. 564.
10. 4 Stat. 735.
11. 17 Stat. 484.
12. 4 Stat. 564.
13. Act of July 29, 1848 (9 Stat. 252).
14. 15 Stat. 228.
15. 19 Stat. 58.
16. 22 Stat. 181.
17. Act of January 30, 1897 (29 Stat. 698).
18. P.L. 81-870.
19. 63 Stat. 14.
20. P.L. 84-533.

21. 83 Stat. 120.

22. Act of July 2, 1862 (12 Stat. 503).

23. Act of August 30, 1890 (26 Stat. 418).

24. 54 Stat. 1237.

25. P.L. 87-27.

26. 33 Stat. 724.

27. P.L. 89-15.

28. P.L. 92-54.

29. 79 Stat. 667.

30. 76 Stat. 920.

31. 7 Stat. 78.

32. 12 Stat. 834.

33. 14 Stat. 309.

34. 20 Stat. 282.

35. 24 Stat. 388.

36. 25 Stat. 217, 239.

37. 30 Stat. 79.

38. 210 U.S. 50 (1908).

39. 39 Stat. 969, 988.

40. P.L. 90-280.

41. 39 Stat. 950.

42. 43 Stat. 536.

43. 42 Stat. 364.

44. 35 Stat. 53.

45. P.L. 85-205.

46. 46 Stat. 9.

47. Act of May 15, 1930, P.L. 71-285.

48. Act of February 13, 1931, P.L. 71-173.
49. Act of October 8, 1940, P.L. 76-761.
50. Act of July 1, 1940, P.L. 76-497.
51. Act of August 8, 1946, P.L. 79-874.
52. Act of July 11, 1947, P.L. 80-235.
53. Act of October 6, 1949, P.L. 81-628.
54. Act of August 17, 1950, P.L. 81-732.
55. 45 Stat. 1185.
56. 60 Stat. 962.
57. P.L. 80-454.
58. P.L. 82-291.
59. P.L. 85-249.

FOOTNOTES TO SECTION FOUR

1. Richardson, James D., A Compilation of Messages and Papers of the Presidents (1789-1902), Vol. I. p. 199.
2. Ibid. p. 16.
3. Ibid. p. 236.
4. Ibid. p. 683.
5. 25 Stat. 388.
6. Ibid. p. 45.
7. Public Papers of the Presidents, Richard M. Nixon, 1970, U.S.G.P.O., Washington, D.C., 1971, pp. 564-576.
8. Congressional Record, House, July 17, 1882, p. 6153.
9. Ibid. p. 6154.
10. Congressional Record, House, August 4, 1921, p. 4659.
11. Ibid. p. 4671.
12. Ibid. p. 4672.
13. Ibid. p. 4672.
14. See United States v. Santa Fe Pacific R. Co. 314 U.S. 339 (1941).
15. See Choate v. Trapp, 224 U.S. 665 (1912).
16. Cherokee Nation v. Georgia, 5 Pet. 1 (1831).
17. See Ex Parte Crow Dog, 109 U.S. 556 (1883) and United States v. Kagama, 118 U.S. 375 (1886).

18. See *Perrin v. United States*, 232 U.S. 478 (1914) and *Seymour v. Superintendent*, 366 U.S. 351 (1962).

19. *Seminole Nation v. United States*, 316 U.S. 286, at 296-296, (1942).

20. 42 Stat. 208.

21. 48 Stat. 596.

22. 49 Stat. 1967.

23. See, for example, the Act of July 1, 1898, 30 Stat. 567 which ratifies an agreement between the Dawes Commission and the Seminoles.

24. *United States v. Sandoval*, 231 U.S. 31, at 45-47 (1913).

25. Ibid. p. 46.

26. *Elk v. Wilkins*, 112 U.S. 94 (1884).

27. Constitution, art. 1, sects. 2, 8; art. 2, sect. 2.

28. 5 Pet. i (1831).

29. P.L. 92-318.

30. P.L. 91-152.

31. P.L. 83-480.

32. P.L. 88-352.

33. P.L. 92-54.

34. Cohen, Felix A., *Federal Indian Law*, p. 275.

35. P.L. 94-638.